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No. 88-579

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

—o—

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, A New Jersey Corporation,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED FOR REVIEW

I. Should an action for unliquidated damages instituted on behalf of a Chapter 11 debtor and its general creditors be barred because express reference to such potential claim was not included in the debtor's Schedule of Financial Affairs and Disclosure Statement filed in accordance with sections 521 and 1125 of the United States Bankruptcy Code? Does not such a bar violate the purposes of sections 521 and 1125, and of the Bankruptcy Code as a whole, to protect creditors?

II. Do not section 1125(a) of the United States Bankruptcy Code and Congressional intent, as expressed in the legislative history of that section, necessitate a factual record of competent evidence in order for a Court to determine whether a debtor has provided "adequate information" in its disclosure statement for purposes of a reorganization proceeding under Chapter 11 of the United States Bankruptcy Code?

III. Did the Court of Appeals depart from the usual and accepted course of judicial proceedings in regard to motions under Rule 12(b), 12(c), and 56 of the Federal Rules of Civil Procedure by making assumptions of fact not of record on critical factual issues and using those assumptions of fact to determine that the movant was entitled to judgment as a matter of law?

LIST OF PARTIES

The parties named in the caption of the case in this Court are all the parties that were involved in the proceeding in the Court whose judgment is sought to be reviewed.

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H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 20, 21
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The petitioner Oneida Motor Freight, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on May 31, 1988.

CITATIONS OF REPORTED AND UNREPORTED OPINIONS

The opinion of the United States Court of Appeals for the Third Circuit is reported at 848 F. 2d 414 (1988), with the dissenting opinion of Judge Stapleton commencing at 848 F. 2d 420. The opinion of the United States District Court for the District of New Jersey in *Oneida Motor Freight v. United Jersey Bank,* Civil Action No. 87-1440 (July 6, 1987) is unreported. The opinion is set forth in the Appendix hereto at App. 26.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1) by the filing of a petition for *certiorari* by a party to a civil action in the United States Court of Appeals. The opinion of the Court of Appeals was filed on May 31, 1988. A timely-filed petition for rehearing was denied by the Court of Appeals on July 1, 1988.

CITATION AND TEXT OF STATUTES AND RULES INVOLVED

11 U.S.C. Section 521(1):

521. Debtor's duties. The debtor shall—

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

11 U.S.C. Section 1125(a) and (b):

1125. Postpetition disclosure and solicitation.

(a) In this section—

(1) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan; and

(2) "investor typical of holders of claims or interests of the relevant class" means investor having—

(A) a claim or interest of the relevant class;

(B) such a relationship with the debtor as the holders of other claims or interests of such class generally have; and

(C) such ability to obtain such information from sources other than the disclosure required by this section as holders of claims or interest in such class generally have.

(b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under this title from a holder of a claim or interest with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. The court may approve a disclosure statement without a valuation of the debtor or an appraisal of the debtor's assets.

Federal Rules of Civil Procedure, Rule 12(b) and (c):

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over

the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Civil Procedure, Rule 56(c):

Rule 56. Summary Judgment.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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STATEMENT OF THE CASE

Prior to July 10, 1985, Petitioner was engaged in the interstate and intrastate movement of general commodities as a certified common carrier. As of March 31, 1985, Petitioner had assets of $21.5 million and liabilities of $16.5 million.

Petitioner had entered into banking relations with Respondent in 1982. In 1984, Petitioner entered into a Revolving Credit Agreement with Respondent pursuant to which Respondent agreed to extend credit to Petitioner through loans and letters of credit up to an aggregate amount of $5,000,000.00. At the same time, Petitioner entered into an Accounts Receivable Loan and Security Agreement with Respondent, which provided that Respondent would lend funds based on a designated percentage of Petitioner's qualified accounts receivable and that Respondent would receive an assignment of such accounts receivable as collateral. Respondent also held security interests in nearly all Petitioner's assets as collateral for loans to be made and letters of credit to be issued. At no time were the lending limits of either of the agreements between Petitioner and Respondent reached or exceeded.

Petitioner had acquired the operating rights and assets of Dorn's Transportation, Inc., in 1981. The purchase price for the acquisition was payable over a period of years. A dispute arose between Petitioner and Walter Dorn regarding the payment of the balance of the purchase price, and the parties agreed to secure the amount in dispute by the issuance of letters of credit by Respondent.

In February 1985, the dispute was settled, and Respondent was called upon by Petitioner to pay $920,000.00

to Dorn. Rather than paying in accordance with the terms of the Letters of Credit, as had been previously agreed, however, without authority from or prior notice to Petitioner, Respondent withdrew $450,000.00 from Petitioner's bank account in partial payment to Dorn. This action was taken despite the collateral given to Respondent with a value that greatly exceeded the amount of Respondent's outstanding loans to Petitioner. As a result of Respondent's wrongful act, Petitioner's bank account became habitually overdrawn.

Petitioner complained to Respondent regarding the above-described unauthorized withdrawal from Petitioner's account, and Respondent assured Petitioner that Respondent would continue to honor Petitioner's checks. Petitioner therefore continued its relationship with Respondent as its principal bank, and Respondent did honor Petitioner's checks for several months. On or about July 2, 1985, however, Respondent requested Petitioner's sole stockholder, Donald T. Singleton, to personally guarantee Petitioner's debt. Singleton refused. Thereafter, Respondent requested Petitioner to provide cash-flow projections. Petitioner informed Respondent that it would require approximately two weeks to provide such projections. Respondent advised Petitioner that such a timetable was satisfactory.

Immediately prior to the Fourth of July holiday weekend in 1985, Petitioner issued to its creditors and employees checks in an amount of approximately $1,000,000.00 in the ordinary course of business. On July 5, 1985, three days after Respondent advised Petitioner that it would await the cash-flow projections it had requested, Respondent ceased honoring Petitioner's checks without notice to Petitioner. On July 8, 1985, Respondent told Singleton that if he would now give a personal guarantee of Petitioner's debt, Respondent would advise the payees of Petitioner's checks that the checks had been dishonored as a result of bank error and would direct the payees to pre-

sent the checks again for payment. Singleton refused that proposal.

As a result of Respondent's prior representations and assurances, and its perfidious failure and refusal to notify Petitioner that it would cease honoring Petitioner's checks, Petitioner did not have the opportunity to seek alternative financing. In addition, said actions by Respondent destroyed Petitioner's reputation with its customers and creditors. As a result of the improper acts of Respondent, Petitioner was compelled to file a Petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. Sec. 1101 *et seq.*, on July 10, 1985.

In order to collect accounts receivable and sell assets in an orderly fashion, Petitioner required post-petition financing. Therefore, Petitioner applied, on an emergency basis, to the Bankruptcy Court for use of cash collateral of Respondent. On July 11, 1985, Respondent filed an "application for relief from the automatic stay; to enforce security interests; to appoint a trustee; and in the alternative for conversion or dismissal of the Chapter 11 case." In addition, Respondent objected to use of its cash collateral by Petitioner. Both applications were "contested matters" instituted by notice of motion as provided for in Bankruptcy Rule 9014.

On July 25, 1985, the Bankruptcy Court, after a hearing which had commenced on July 12, allowed Petitioner to use cash collateral up to a limit of $1.5 million. In return, Respondent was given, as additional collateral, liens on unencumbered assets to the extent of cash collateral used.

On December 9, 1985, after all Petitioner's Debtor-in-Possession checks had cleared and service charges had been paid, Petitioner wrote to Respondent to request a payment to close the cash collateral account. A dispute then arose as to additional service charges that Respondent had subtracted from the balance in the account. There was correspondence between counsel for Petitioner and Respondent in regard to this dispute.

Ultimately, Respondent agreed to refund the service charges. However, a form of order submitted by counsel for Respondent as to the service charge issue included a paragraph purporting to release Respondent from *all* claims Petitioner had against it. On February 3, 1986, Petitioner's counsel advised counsel for Respondent that Petitioner objected to the inclusion of language constituting a general release in the proposed Order. On March 3, 1986, an order without a general release was entered by the Bankruptcy Court.

As early as October 1985 (just three months after the filing of the Chapter 11 Petition), Respondent was paid the full amount of its secured indebtedness, a sum in excess of $7,600,000. On June 9, 1986, Respondent filed a proof of claim in Petitioner's bankruptcy proceeding relating to attorney's fees and interest in the approximate amount of $277,000. Petitioner has challenged that claim.

Petitioner and its Creditors Committee jointly prepared a proposed Plan of Reorganization and a Disclosure Statement pursuant to 11 U.S.C. section 1125. Respondent was therein designated a creditor of a class different from the general unsecured creditors. Respondent was the only creditor in that class of creditors.

Petitioner filed its Disclosure Statement with the Bankruptcy Court in the Spring of 1986. Among other things, the Disclosure Statement made reference to the money owed by Petitioner to Dorn that was secured by Letters of Credit issued by Respondent. The Disclosure Statement went on to say that when Respondent was called upon to pay the Letters of Credit, "rather than paying both Letters of Credit and increasing its outstanding loans with the Debtor, which were secured by accounts receivable and certain revenue equipment, the Bank unilaterally withdrew Four Hundred Fifty Thousand Dollars ($450,000) from the Debtor's operating account to be applied towards satisfaction of the Dorn's settlement. Said withdrawal caused an immediate overdraft in the Debtor's ac-

count, which became a chronic situation until the filing of the bankruptcy proceedings in July, 1985."

The disclosure statement then added:

"As stated above, when the bank withdrew Four Hundred Fifty Thousand Dollars ($450,000) in February, 1985, to fund the settlement with Dorn's Transportation, Inc., the Debtor's account became habitually overdrawn or funded substantially with uncollected funds.

"On July 5, 1985, without notice to the Debtor, the bank ceased honoring checks on uncollected or overdrawn funds and returned unpaid the Debtor's July 3, 1985 payroll checks as well as other checks which were being presented to it on an ongoing basis.

"By virtue of the bank's refusal to finance the Debtor, the Debtor had no alternative but to file the Chapter 11 proceedings on July 10, 1985."

Included as an appendix to the Oneida Disclosure Statement was the amended Joint Plan of Reorganization in Oneida's bankruptcy case. Article XII of the Plan of Reorganization provided: "All claims and causes of action in favor of the Debtor and Debtor-in-Possession not expressly released or terminated in accordance with the Plan are hereby preserved and may be prosecuted by the Debtor or the Creditors' Committee after entry of the Confirmation Order."

Petitioner never expressly released its claims or causes of action against Respondent. In fact, Petitioner had expressly refused to give Respondent a general release.

Respondent neither voted in favor of, nor objected to, confirmation of the Amended Joint Plan of Reorganization. The Plan was confirmed by order of the Bankruptcy Court on August 14, 1986.

Petitioner commenced the present action against Respondent on March 11, 1987 in the Superior Court of New Jersey. Petitioner asserted claims against Respondent for breach of the credit and loan agreements, breach of a

course of dealing, breach of the duty of good faith arising from Respondent's banking practices, and fraud. On March 30, 1987, the United States Bankruptcy Court for the District of New Jersey entered an order allowing an amendment to the Reorganization Plan, providing that the creditors of Petitioner would share in any damages award against Respondent in the aforesaid action.

Respondent answered the Complaint on April 15, 1987. Respondent removed the action to the United States District Court for the District of New Jersey on April 20, 1987, pursuant to 28 U.S.C. section 1334(b), on the ground that Petitioner was a debtor in a case under Title 11 of the United States Code. On May 14, 1987, Respondent moved to dismiss the Complaint pursuant to Rules 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure. On July 6, 1987, the District Court entered an Order dismissing the Complaint on grounds of *res judicata,* holding that the claims asserted in the Complaint should have been raised by Petitioner during the course of its bankruptcy case. Oneida filed a Notice of Appeal from said Order on July 31, 1987. On May 31, 1988, the United States Court of Appeals for the Third Circuit, with one judge dissenting, filed an opinion affirming the decision of the District Court on the different ground that Petitioner was estopped from asserting the claims in its Complaint because Petitioner had not disclosed those claims during the course of its bankruptcy case. A petition for rehearing was denied by the Court of Appeals on July 1, 1988.

REASONS FOR ALLOWANCE OF THE WRIT

This Case Presents Important Questions of Federal Bankruptcy Law That the Supreme Court Has Not Decided and Should Decide, and That the Court of Appeals for the Third Circuit Decided Contrary to the Spirit and Purpose of the Bankruptcy Code and the Decisions of Other Circuit Courts.

I. The Fundamental Purposes of the United States Bankruptcy Code to Protect Creditors and Rehabilitate Debtors in Chapter 11 Bankruptcy Proceedings Are Plainly Contravened by the Decision of the Court of Appeals that Petitioner Is Barred from Maintaining this Action Against Responent Because this Unliquidated Claim Was Not "Announced" by Petitioner During Its Bankruptcy Case.

In its Complaint filed against Respondent on March 11, 1987, Petitioner alleged that Respondent had breached its lending agreements and course of dealing with Petitioner and its duty of good faith to Petitioner, and had perpetrated a fraud upon Petitioner. Petitioner further alleged that Respondent's wrongdoing caused Petitioner to file a petition under Chapter 11 of the Bankruptcy Code, to terminate its operations, and to suffer a complete loss of its business. The Amended Joint Plan of Reorganization of Petitioner and its Creditors Committee provides that Petitioner's general unsecured creditors would share in the proceeds of Petitioner's recovery, if any, from Respondent in this action.

Respondent moved to dismiss Petitioner's claim pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure on grounds that Petitioner's bankruptcy case precluded maintenance of this action. The District Court granted Respondent's motion, and dismissal of the Complaint was affirmed by the Court of Appeals for the Third Circuit.

The Third Circuit held, among other things, that "[Petitioner]'s failure to announce this claim against [Respondent] precludes it from litigating the cause of action at this time."* *Oneida Motor Freight v. United Jersey Bank,* 848 F.2d 414, 418 (3d Cir. 1988). The Third Cir-

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* Petitioner disputes the Third Circuit's conclusion that Petitioner failed to announce its claim against Respondent, and that dispute is discussed in Points II and III, *infra*.

cuit's holding thus amounts to a declaration that, as a matter of law, a debtor in a proceeding under Chapter 11 of the Bankruptcy Code that does not disclose during its bankruptcy proceedings the existence of an *unliquidated* claim it might have against a secured creditor is thereafter barred from asserting that claim in a separate lawsuit. Petitioner submits that the holding of the court below is not in accord with any provision of the United States Bankruptcy Code of 1978 and 1984, 11 U.S.C. section 101 *et seq.;* is contrary to the underlying purpose of the Bankruptcy Code; and conflicts with a recent decision of the Court of Appeals for the Fifth Circuit and other federal caselaw. The Third Circuit's decision, if undisturbed by this Court, will have far-reaching, deleterious effects on debtors and creditors in Chapter 11 bankruptcy proceedings.

The primary purpose of the Bankruptcy Code is to facilitate the rehabilitation of debtors, while at the same time ensuring fair and equitable treatment of all the creditors of the debtor. Inasmuch as the Third Circuit's decision would foster obstruction of the rehabilitation of debtors and would diminish the extent of payment to creditors, it is contrary to the primary purpose of the Bankruptcy Code. Furthermore, the decision would permit, in the words of the dissenting opinion below, a "windfall" to a wrongdoer—in this case a secured creditor that had been paid in full—to the detriment of the debtor and its unsecured creditors. (App. 16)

In ruling that Petitioner had wrongfully failed "to announce" its claim against Respondent, the majority of the court below relied specifically upon two sections of the United States Bankruptcy Code: section 521(1) and section 1125.

Section 521(1) provides that a debtor must "file a . . . schedule of assets and liabilities . . . and a statement of the debtor's financial affairs." 11 U.S.C. sec. 521(1). The

majority noted that in the schedules it filed pursuant to section 521(1), Petitioner set forth a debt of approximately $7.7 million to Respondent, but made no mention of any claim *against* Respondent. The majority employed the silence of Petitioner's schedules as a basis for affirming the dismissal of Petitioner's Complaint in the instant matter. Petitioner submits that the underlying purposes of section 521, in conjunction with the purposes of the Bankruptcy Code as a whole, are undermined by the decision of the Third Circuit.

The general purpose of requiring a debtor to file a schedule of its creditors and liabilities is to enable creditors to receive timely notice of bankruptcy proceedings that may affect their interests. *Ford Motor Credit Co. v. Weaver,* 680 F.2d 451, 456 (6th Cir. 1982). A debtor will not be discharged from its debt to a creditor who was omitted from a schedule filed by the debtor pursuant to section 521(1). 11 U.S.C. sec. 523(a)(3). The general purpose of requiring a debtor to file a statement of financial affairs is to furnish the creditors with detailed information concerning the debtor's financial condition without requiring a long and protracted examination to obtain such information. *United States v. Stone,* 282 F.2d 547 (2d Cir. 1960); 3 *Collier on Bankruptcy,* paragraph 521.09 at 521-36 to 521-37 (15th ed. 1988).

Clearly, therefore, the purpose of section 521(1) is to obligate the debtor to make disclosures for the benefit of creditors.

When Petitioner filed its schedules, it did not mention therein a potential unliquidated lender liability claim against Respondent. However, the absence of that claim from the schedules had no adverse effect on fulfillment of the purposes of section 521(1). It did not prevent any creditor from receiving notice of the bankruptcy proceeding, nor did it detract from the detailed financial information provided by Petitioner to its creditors. While absence of a potential asset from Petitioner's schedules could have

been grounds for revocation of the discharge received by Petitioner had it been tantamount to a fraudulent concealment, 11 U.S.C. secs. 727(d) and 1141(d), in this case Petitioner and its Creditors Committee have provided in their Amended Joint Plan of Reorganization that Petitioner's general creditors would share in the proceeds, if any, from the prosecution of the claim. The dismissal of the claim is therefore detrimental not only to Petitioner, but also to Petitioner's creditors. Petitioner submits that it is truly incongruous for the Third Circuit to utilize a provision of the Bankruptcy Code intended to benefit creditors to do those creditors such an injustice. (See dissenting opinion of Judge Stapleton at App. 21.)

For the same reason, the Third Circuit's reliance on section 1125 of the Bankruptcy Code to affirm dismissal of Petitioner's Complaint must be reviewed. Section 1125 (b) of the Code provides that a debtor under Chapter 11 must file a disclosure statement before it can solicit creditors to accept a plan of reorganization. The majority opinion below, citing 5 *Collier on Bankruptcy* paragraph 1125.03 (15th ed. 1988), referred to the disclosure statement as the "pivotal concept in reorganization procedure under the Code."

The primary purpose of this "pivotal concept" has been described as "provid[ing] all material information which creditors . . . affected by the plan need in order to make an intelligent decision whether to vote for or against the plan." *In re Unichem Corp.*, 72 B.R. 95, 97 (Bkrtcy. N.D. Ill. 1987). Similarly, in *In re Brandon Mill Farms, Ltd.*, 37 B.R. 190, 192 (Bkrtcy. N.D. Ga. 1984), the court stated that the disclosure statement is intended to assist the creditors in evaluating the plan on its face. Furthermore, in *In re Stanley Hotel,* 13 B.R. 926, 929 (Bkrtcy. D. Colo. 1981), the court held that the disclosure statement is supposed to inform claimants "as fully as possible, about the probable financial results of acceptance or rejection of a particular plan."

The common theme running through the above cases is that the disclosure statement is for the benefit of creditors, to help them assess a proposed reorganization plan and decide whether to vote in favor of that plan.

The Third Circuit relied on the silence of Petitioner's Disclosure Statement regarding a possible claim against Respondent to affirm dismissal of Petitioner's Complaint against Respondent. In so doing, the court below once again employed, to the detriment of Petitioner's creditors, a statutory provision designed to benefit those creditors. The majority opinion creates a rule of law that a debtor's failure "to announce" in its Disclosure Statement the existence of a possible claim against a secured creditor bars the debtor from thereafter asserting such a claim. The effect of such a rule of law is to give a windfall to a wrongdoer at the expense of both the debtor seeking rehabilitation and the innocent creditors seeking fair and equitable treatment. (See dissenting opinion of Judge Stapleton at App. 21.) The Third Circuit's decision thus clearly violates the primary purposes of the Bankruptcy Code.

The fallacy of the Third Circuit decision is made obvious by an analysis of the situation. The Petitioner submitted a Disclosure Statement that was approved by the bankruptcy court as containing "adequate information" as defined by 11 U.S.C. section 1125(a); the Disclosure Statement indicated that the Petitioner would be able to make a plan of reorganization that would provide for payment of approximately 25 to 30 cents on the dollar to general unsecured creditors, depending on the amount of allowed unsecured claims; the creditors found the proposed plan to be acceptable and voted to approve the plan; the creditors' acceptance of the proposed plan was solicited and obtained without reference to the possibility of an unliquidated claim against Respondent that would have no positive impact on the Plan of Reorganization unless successful, but could increase the dividend to creditors

to some extent if it were successful. Petitioner submits that the Third Circuit's use of section 1125 (which was intended to benefit creditors) to the detriment of the creditors and Petitioner because Petitioner did not tell the creditors that Petitioner *might* be able to pay its creditors some *indeterminable* additional amount at some *unforeseeable* date in the future is unfair and contrary to the purposes of the Bankruptcy Code.

It is also at odds with the very recent decision of the Fifth Circuit Court of Appeals in *Matter of Texas Extrusion Corp.*, 844 F.2d 1144 (1988). In that case, the Fifth Circuit noted that "the determination of what is adequate information is subjective and made on a case by case basis," and is a decision "largely within the discretion of the bankruptcy court." 844 F.2d at 1157. The Fifth Circuit was addressing the question whether the debtor's failure to reveal in its disclosure statement that it was contemplating seeking equitable subordination of the claims of its largest creditor rendered the information in the statement inadequate. (Equitable subordination is a procedure pursuant to which the bankruptcy court can order a particular creditor's claim to be paid *after* instead of before the claims of other creditors. 3 *Collier on Bankruptcy, supra,* para. 510.02. This can enhance the recovery of those other creditors, particularly if the subordinated creditor has a sizeable claim.) The Court answered the question in the negative, holding that conjecture that the creditor's claims might be subject to equitable subordination "is not the type of information that is required in a disclosure statement to provide 'adequate information' to a creditor." *Ibid.*

Petitioner respectfully submits that the principle expressed by the Fifth Circuit in *Matter of Texas Extrusion Corp.* should apply here. The possibility that Petitioner might assert an unliquidated claim against a secured creditor is not the type of information that is required in a disclosure statement to provide ade-

quate information. At the time the statement was prepared, it was merely conjecture whether that claim would in any way enhance the debtor's estate for the benefit of creditors. Disclosure of such uncertainty ought not to be considered necessary to provide adequate information, since it would not have enhanced the ability of creditors to make an informed judgment about a proposed plan of reorganization and was not essential to the success or failure of the plan, which the creditors approved anyway.

Similarly, in *In re Werth,* 29 B.R. 220 (Bankruptcy D. Colo. 1983), the court held that a debtor did not have to reveal in its disclosure statement what claims of creditors it intended to challenge and why. The court's reasoning in *Werth* is also applicable in the present matter: "In my judgment, the objections to claims do not bear on the success or failure of the plan in this case. . . . The value of the estate as presently reported in the disclosure statement is at its minimum, and any successful objections to claims will serve to increase the assets of the estate for the benefit of creditors. The informed choice of the creditors will not be enhanced because of the uncertainties as to which claims will be disputed as well as the uncertainties of the outcome of these proceedings." 29 B.R. at 223. *Accord In re J.E. Jennings, Inc.,* 46 B.R. 167, 172 (Bankruptcy E.D. Pa. 1985) (no need to disclose intended preference actions).

For the same reasons, failure to disclose the possible claim against Respondent in the disclosure statement should not bar Petitioner from maintaining this lawsuit against Respondent. This is particularly so where, as here, the Petitioner's plan of reorganization: has preserved for post-confirmation prosecution any claims not expressly released by Petitioner; and has provided for retention of jurisdiction by the bankruptcy court in the event of assertion of claims that would enhance the debtor's estate. *See In re J.E. Jennings, Inc., supra,* 46 B.R. at 170; *In re Air One, Inc.,* 75 B.R. 998, 1002 (Bankruptcy E.D. Mo. 1987).

Furthermore, as pointed out by Judge Stapleton in his dissenting opinion in the Court below, the absence of specific reference to the claim against Respondent in Petitioner's disclosure statement did not in any way harm Petitioner's creditors, who approved Petitioner's Plan of Reorganization. On the other hand, dismissal of Petitioner's lawsuit against Respondent *does* harm the creditors, by denying them potential recovery of additional funds if the action is successful. Thus, the purposes of the Bankruptcy Code are carried out by continuation, not dismissal, of this action. *Cf. In re J.E. Jennings, Inc., supra,* 46 B.R. at 171.

In essence, Petitioner submits, the decision of the Court of Appeals for the Third Circuit establishes a rule of law that will wrongly penalize a debtor and its creditors if the debtor does not disclose claims involving truly uncertain recoveries in soliciting acceptances of a plan of reorganization from the creditors.

In deciding that Petitioner's "failure to announce" its claim against Respondent precludes Petitioner from now maintaining an action against Respondent, the Third Circuit also noted that Petitioner could have raised its claim against Respondent at the time Respondent moved to vacate the automatic stay in Petitioner's bankruptcy case,* or at the hearing on Petitioner's application to use cash collateral. However, the hearing of both Respondent's motion and Petitioner's application was held on July 12, 1985, just two days after Petitioner commenced its case under Chapter 11. Petitioner was then attempting to salvage its business of 50 years despite Respondent's actions, and was not in a position to consider counterclaims or affirmative defenses. Furthermore, the Third Circuit,

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* The majority opinion did concede that from a procedural standpoint and from a practical standpoint Petitioner could not litigate its claims against Respondent as a counterclaim to the motion to vacate the stay, but concluded that Petitioner should have at least mentioned its claims at that time for the consideration of the bankruptcy court.

affirming a decision on a motion pursuant to Rule 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure and thus lacking a full evidential record, could not have known what was or was not mentioned at that hearing. Moreover, regardless of whether or not any mention was made by Petitioner of a potential claim, Respondent was aware of its wrongful conduct. Respondent, a tortfeasor, should not be excused from its conscious wrongdoing because its victim failed to mention a possible claim against it.

Even disregarding the faulty logic of the majority of the court below, however, Petitioner submits that the United States Bankruptcy Code, and the purposes the Code seeks to carry out, are contravened by the suggestion that if a debtor does not mention a possible claim against one of its creditors as early as two days after commencement of its bankruptcy case, the debtor can lose its right to pursue that claim. Such a result is incompatible with the concept of a "fresh start" for the debtor and fair and equitable treatment for all creditors.

The decision of the Third Circuit also undermines the purposes of the Bankruptcy Code to allow for speedy, simple, and expeditious resolution of bankruptcy cases. Speed and simplicity are important to both debtors and creditors, as they enable prompt distribution to creditors on their claims, reduce administrative expenses to debtors, and increase the ultimate recovery by creditors by minimizing the adverse effects of attempting to operate for an extended time under the protection of federal bankruptcy laws. 5 *Collier on Bankruptcy,* para. 1125.02 at 1125-10 (15th ed. 1988). The Third Circuit decision establishes a rule of law that will interfere with the speed and simplicity of bankruptcy proceedings and will impede the accomplishment of the Code's purposes. The Third Circuit holds that a debtor must mention, during its bankruptcy proceedings, a possible claim it might have against a secured creditor. The majority of the court stopped short of specifically requiring a debtor to *litigate* its possible claim

against its secured creditor in bankruptcy court. However, this Court must recognize that in most cases, if a debtor is required to mention a potential claim against a secured creditor, litigation of that claim will surely result, either in the bankruptcy court itself or in another court while the bankruptcy case is pending. If the possible claim is in any way substantial or complicated, the requirement that the debtor mention such claim in its bankruptcy case is extremely likely to defeat the simplicity and expeditiousness of bankruptcy proceedings, to the detriment of both the debtor and its creditors.

It is submitted that the Third Circuit's decision that Petitioner's failure to mention its possible claim against Respondent bars Petitioner from maintaining this lawsuit is not warranted by the Bankruptcy Code, and is contrary to the purposes of the Code to assist debtors and creditors and to expedite bankruptcy cases.

It is submitted further that the intervention of this Court is necessary to prevent the undermining of the fundamental purpose of sections 521 and 1125, and of the entire Bankruptcy Code, particularly where it would result in a windfall to one tortfeasor-creditor. Such intervention is necessary in order that results that are just and fair to all parties be achieved, as intended by Congress.

II. The Provisions of The Bankruptcy Code Regarding Disclosure Statements and the Legislative History of Those Provisions Are Plainly Contravened by the Third Circuit's Legal Conclusion That Petitioner's Disclosures Were Informationally Deficient.*

The majority of the court below ruled that Petitioner is barred from maintaining its lawsuit against Respondent

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* In Point I, *supra,* Petitioner challenges the Third Circuit's decision that Petitioner's failure to announce its claim against Respondent bars litigation of that claim. In this Point, Petitioner submits that even the Third Circuit's determination that Petitioner failed to announce its claim against Respondent clearly contravenes the provisions and purposes of the Bankruptcy Code.

because Petitioner "failed to announce" its claim against Respondent during the course of its bankruptcy case. In making that decision, the majority necessarily first reached the conclusion that Petitioner had "failed to announce" its claim against Respondent. That conclusion is, however, contrary to section 1125(a) of the United States Bankruptcy Code, 11 U.S.C. sec. 1125(a), and to the legislative history and interpretive caselaw regarding that section.

The Third Circuit called the duty of a debtor to file a disclosure statement containing "adequate information" a duty of paramount importance "in the reorganization of a Chapter XI [*sic*] debtor." The Third Circuit proceeded to give lip service to the legislative history of section 1125, stating "adequate information will be determined by the facts and circumstances of each case. H.R. Rep. No. 595, 97th [*sic*] Cong., 1st Sess. 266 (1977)." (App. 8) However, in reality the Court gave no consideration to the facts and circumstances of the case. Indeed, Respondent moved to dismiss Petitioner's Complaint pursuant to Rule 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure, and no factual record of any significance was before the Court. Instead, the Third Circuit simply concluded that Petitioner had failed to mention the potential claim against Respondent and thus had failed to provide adequate information.

The Third Circuit's conclusion is clearly an unreasoned, erroneous conclusion that disregards, and radically departs from, the provisions of the Bankruptcy Code that it purports to uphold and the Congressional intent behind those provisions, as expressed in the legislative history.

House of Representatives Report 95-595 described the requirement of disclosure of adequate information as set forth in section 1125 of the Bankruptcy Code as follows:

> "Subsection (a) contains two definitions. First, 'adequate information' is defined to mean information of a kind, and insufficient [sic] detail, that would en-

able a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. Second, 'investor typical of holders of claims or interests of the relevant class' is defined to mean an investor having a claim or interest of the relevant class, having such a relationship with the debtor as the holders of other claims or interests of the relevant class have, and having such ability to obtain information from sources other than the disclosure statement as holders of claims or interests of the relevant class have. . . .

"The Supreme Court's rulemaking power will not extend to rule-making that will prescribe what constitutes adequate information. That standard is a substantive standard. *Precisely what constitutes adequate information in any particular instance will develop on a case-by-case basis. Courts will take a practical approach as to what is necessary under the circumstances of each case.* . . . There will be a balancing of interests in each case. In reorganization cases, there is frequently great uncertainty. Therefore the need for flexibility is greatest. . . . The court will be able to determine what is necessary in light of the facts and circumstances of each particular case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 408-409 (1977) (emphasis added).

Senate Report 95-989 added, in pertinent part, the following:

"Both the kind and form of information are left essentially to the judicial discretion of the court, guided by the specification in subparagraph (a)(1) that it be of a kind and in sufficient detail that a reasonable and typical investor can make an informed judgment about the plan. The information required will necessarily be governed by the circumstances of the case." S. Rep. No. 989, 95th Cong., 2d Sess. 120-121 (1978).

The flexibility of the Bankruptcy Code's disclosure requirements was also noted by the Eighth Circuit Court

of Appeals in *In re Monnier Brothers,* 755 F.2d 1336, 1342 (8th Cir. 1985).

The adequate information requirements are further summarized in 5 *Collier on Bankruptcy,* para. 1125.03, pp. 1125-20 through 1125-23 (15th ed. 1988) as follows:

> "The definition of 'adequate information' contained in section 1125 (a)(1) must be considered in conjunction with the phrase, 'investor typical of holders of claims or interest of the relevant class' which is defined in section 1125 (a)(2). The definition contained in section 1125 (a)(2) is most important since it is an acknowledgement of the fact that the quality of information available to members of a given class will vary and the sophistication of members of such class may also vary. Section 1125 (a)(2) also reflects the awareness of the draftsmen that *there may be differences with respect to the sophistication of members of different classes and the relative access of such classes to the relevant information.*
>
> "For example, . . . [a bank] presumably will be more sophisticated in financial matters than the trade creditor and, depending on the circumstances of the case, may have access to detailed current and historical financial information concerning the debtor's business which is not, and has not been, available to the trade. . . .
>
> "In determining whether a disclosure statement contains 'adequate information,' . . . the court must consider whether the typical member of a class is able to obtain sufficient information to make a reasonable judgment *from sources other than the information statement which must be furnished under section 1125(b)*
>
> . . . .
>
> "Since the purpose of a disclosure statement is to provide interested parties with enough information so that they are able to make intelligent decisions regarding the plan, a determination as to the adequacy of the contents of the disclosure statement will necessarily depend upon the circumstances of each case." (Emphasis added.)

The Third Circuit disregarded and contravened the provisions of section 1125 of the Bankruptcy Code and the Congressional intent behind those provisions in concluding that Petitioner failed to announce its claim against Respondent. Worse still, the Court used its faulty conclusion as a basis to dismiss Petitioner's action against Respondent, to the detriment of Petitioner and its creditors and in further contravention of the purposes behind the Bankruptcy Code.

The Third Circuit gave no consideration to the facts and circumstances of Petitioner's bankruptcy case, upon which a determination of inadequate disclosure depends pursuant to 11 U.S.C. section 1125. The Court did not give any consideration to the detailed information included in Petitioner's disclosure statement; it took into account only what was excluded. The Court did not give any consideration to the fact that the Bankruptcy Court had determined that Petitioner's disclosure statement *did* contain adequate information. The Court did not give consideration to the fact that Respondent was the only creditor in its class in Petitioner's bankruptcy case, so that the adequacy of the information provided to Respondent in the disclosure statement was to be determined independent of the adequacy of the information for purposes of all other creditors. The Court did not give any consideration to the fact that Respondent was a sophisticated creditor presumably with greater sources of knowledge than trade creditors. The Court did not give any consideration to the fact that Petitioner's disclosure statement properly set forth "the incidents which led to the filing of the Chapter 11," *see In re A.C. Williams Co.*, 25 B.R. 173, 176 (Bankruptcy N.D. Ohio 1982), from which the sophisticated Respondent should have been fully aware that Petitioner claimed that Respondent's wrongful conduct caused Petitioner to file its petition.

Essentially, the decision of the Third Circuit advocates form over substance, concerning itself with whether

Petitioner's disclosure statement explicitly mentioned a claim against Respondent rather than with whether, from the disclosure statement and other sources of knowledge, Respondent knew Petitioner had a claim against it. The danger here is that a debtor, having prepared a disclosure statement that contains adequate information for purposes of its proceeding under Chapter 11 of the Bankruptcy Code, will be deprived of certain rights, to its detriment and the detriment of its creditors, at the whim of a Court that decides, without regard to the facts and circumstances of the case, that the disclosure statement should have said more.

Indeed, it is manifest from the very nature of the issue of "adequate information" under section 1125(a) of the Bankruptcy Code that the issue is not a proper one for determination on a motion pursuant to Rule 12(b)(6) or 12(c). The Court should not have made such a determination without the benefit of a factual record on that issue.

The Third Circuit's legal conclusion that Petitioner's disclosures in its bankruptcy case were informationally deficient is thus repugnant to the Bankruptcy Code and the intent of Congress.

The matter requires intervention by this Court in order to uphold the integrity of the Congressional intent behind the provision for disclosure statements. The Bankruptcy Code contemplates that the adequacy of the information included in a disclosure statement depends on the facts and circumstances of the case. The decision of the Third Circuit, if left undisturbed, eschews that principle in favor of one in which the adequacy of the disclosure statement depends on the exclusion or inclusion of certain items, without regard to the creditors' actual knowledge or other sources of knowledge in a case. The intervention of this Court is also necessary because the Third Circuit's misuse of section 1125 of the Bankruptcy Code is prejudicial to debtors and creditors in cases under Chapter 11, whom the Code is intended to protect.

III. The Third Circuit Reached a Decision That Is Contrary to the Spirit and Purposes of the United States Bankruptcy Code by Making Impermissible Assumptions of Fact, Contrary to Established Federal Judicial Procedure.

Petitioner submits that this case is appropriate for review by this Court because it presents significant issues of federal bankruptcy law that this Court has not previously decided and that the Third Circuit has decided in a manner contrary to the underlying purposes of the Bankruptcy Code.

Petitioner further submits that intervention by this Court is appropriate because the Third Circuit departed from the usual and accepted judicial procedure on motions under Rule 12(b)(6) or 12(c), or even Rule 56, of the Federal Rules of Civil Procedure. Those Rules dictate that a court addressing a motion to dismiss for failure to state a claim, a motion for judgment on the pleadings, or a motion for summary judgment, must read the pleadings and factual matter in the light most favorable to the party opposing the motion. If the court finds that there exist issues of fact that need to be resolved, the court shall not decide those issues of fact. Rather, the court must deny the motion. *Lang v. New York Life Insurance Co.*, 721 F.2d 118, 119 (3d Cir. 1983) (summary judgment); *Angleton v. Pierce*, 574 F. Supp. 719, 723 & n. 1 (D. N.J. 1983), aff'd 734 F.2d 3 (3d Cir. 1984), *cert.* denied 469 U.S. 880 (1984) (judgment on pleadings); *Alken v. Lerner*, 485 F. Supp. 871, 873 (D. N.J. 1980) (judgment on pleadings). In the instant case, the Third Circuit improperly decided issues of fact in reaching its legal conclusion. Moreover, it did so without the benefit of any factual investigation or evidentiary hearing. The Third Circuit *assumed* certain material facts, used those assumptions to resolve issues of fact *adversely* to the party opposing the motion, and then used its resolution of the issues of fact to determine that Respondent was entitled to judgment as a matter of law.

Indeed, the Third Circuit went out of its way to decide the legal issues in a way that contravenes the spirit

and purpose of the Bankruptcy Code. This Court should intervene in order to exercise its "supervisory powers over federal courts . . . to protect the integrity of the federal system." *Cf. Frazier v. Heebe,* 107 S. Ct. 2607, 2612 n. 7 (1987).

The Third Circuit prefaced its discussion of the legal issues by stating: "The historical facts are undisputed." (App. 6) It is clear from the Court's opinion, however, that there did exist disputes of material fact, but that the Court was content to assume the facts it needed in order to apply the legal precepts it chose to apply. The Court cited no legal authority to support its assumption-making exercise.

First, the Third Circuit determined that Petitioner's disclosure statement and plan of reorganization were informationally deficient. As discussed in Point II, *supra,* however, the Bankruptcy Code clearly contemplates that what constitutes "adequate information" in a disclosure statement depends upon the facts and circumstances of each case. Thus, whether Petitioner's disclosures were informationally deficient, particularly *vis-a-vis* Respondent —the sophisticated bank that constituted its own class of creditors—was *not* an undisputed historical fact. Petitioner respectfully submits that the court below could not resolve that fact question without a full examination of the facts and circumstances, and in any event should not have made a finding of informational deficiency on a motion under Rule 12, or 56, of the Federal Rules.

Similarly, the Court should not have concluded that the record in Petitioner's bankruptcy case was "deafeningly silent" with regard to the claim against Respondent. Whether Petitioner's disclosures were adequate is a disputed question of fact that requires an examination of all the underlying circumstances—the sophistication of the Respondent, the Respondent's own knowledge of its wrongful acts, the Petitioner's refusal to give Respondent a general release, the contents of Petitioner's disclosure statement that clearly depicted Respondent's malfeasance

as the cause of Petitioner's bankruptcy, and the express reservation to Petitioner and its Creditors Committee of claims and causes of action not expressly released, to name a few. (See dissenting opinion of Judge Stapleton at App. 22-23 & n.7.) The Third Circuit's conclusion that Petitioner's disclosures were inadequate clearly violated both the Bankruptcy Code and the Federal Rules of Civil Procedure. Absent a proper determination of that disputed question of material fact the court below could not validly comment on the silence or lack of silence of the record in Petitioner's bankruptcy case.

The Third Circuit then proceeded to "assume" that if Petitioner had revealed its potential action against Respondent, that would have had an impact on Respondent's "decision to enter into the stipulation establishing the extent and validity of its lien against [Petitioner] and to vote for confirmation." (App. 10) The court below took its improper resolution of the fact question of adequacy of disclosure and used that improper resolution to "assume" that adequate disclosure would have had some impact on Respondent's participation in Petitioner's bankruptcy case. Petitioner submits that that step in and of itself represents a radical departure from the accepted course of judicial proceedings. The Court's unusual behavior is exacerbated, however, by the fact that the Court's assumption makes no sense. Why would Respondent refuse to stipulate to the extent and validity of its lien against Petitioner? Such a refusal would not increase the extent and validity of that lien. It would only interfere with Respondent being paid. Thus, Respondent would not have benefitted from refusing to enter into the stipulation. Furthermore, Respondent *did not* vote for confirmation of Petitioner's plan of reorganization. Therefore, the Third Circuit's assumption that fuller disclosure by Petitioner would have affected Respondent's decision to vote for confirmation was not only procedurally improper, but also substantively erroneous.

The Third Circuit did not stop there, however. It proceeded to affirm dismissal of Petitioner's Complaint on

grounds of equitable and judicial estoppel. The doctrine of equitable estoppel is entirely fact-sensitive. Its application here requires a finding of the *fact* of some action or inaction by Petitioner, followed by a finding of the *fact* of some action or inaction taken in reliance thereon by Respondent, and a finding of the *fact* that that reliance was detrimental to Respondent. The Third Circuit improperly determined that, as a matter of fact, Petitioner made inadequate disclosures. The Third Circuit then *assumed* that Respondent did, or refrained from doing, something in reliance on Petitioner's alleged inadequate disclosure. The Third Circuit further assumed that Respondent was somehow prejudiced thereby, which even the scanty record that was before the court below clearly shows not to have been the case. (See dissenting opinion of Judge Stapleton at App. 24 & n.8.)

The Third Circuit, feigning concern for Petitioner's creditors, went on to suggest that the application of equitable estoppel was appropriate because "the creditors had reasonably acted in reliance upon the assumed finality" of Petitioner's confirmed Plan of Reorganization. (App. 10) Most respectfully, Petitioner submits that the only actions the creditors took in reliance on the confirmed Plan was to resign themselves to receiving only 25 to 30 percent of their claims. The Third Circuit has now managed to dash any hopes the creditors briefly harbored that commencement of this lawsuit against Respondent might increase their dividend. (See dissenting opinion of Judge Stapleton at App. 21.) In effect, the Third Circuit, by completely disregarding the purposes of the Bankruptcy Code, not only gave a windfall to a tortfeasor—Respondent—, but in so doing ran roughshod over the Federal Rules of Civil Procedure.

The next improper assumption by the Third Circuit was that, had Petitioner's possible claim against Respondent been made known, "neither the bankruptcy court, nor particularly [Respondent], would have agreed to allow [Petitioner] to utilize [cash] collateral." (App. 12) The

cash collateral order was entered by the bankruptcy court on July 25, 1985. Implicit in the Third Circuit's decision, therefore, was the concept that a possible claim that would normally carry a six year statute of limitations has to be mentioned by a debtor within two weeks after commencement of a bankruptcy case lest the debtor thereafter be precluded from asserting that claim. Once again contrary to the purposes of the Bankruptcy Code to rehabilitate debtors, the Third Circuit interprets the Code to impose incredible mandatory disclosure requirements on a debtor, with unmitigatedly harsh penalties.

Moreover, there is nothing in the record that would permit the court below to conclude what the bankruptcy court would or would not have allowed Petitioner to do regarding its need for cash collateral. Does the Third Circuit mean to suggest that if Petitioner had disclosed to the bankruptcy court that it might have a claim against Respondent,* the bankruptcy court would have responded by refusing to allow Petitioner to use cash collateral, leaving Petitioner no choice but to liquidate immediately? Considering the purposes of the Bankruptcy Code and the practicality of bankruptcy proceedings, the bankruptcy court clearly would have done nothing different with regard to Petitioner's application to use cash collateral.

Nor is there anything in the record to suggest that knowledge of Petitioner's potential claim against it (*assuming* Respondent lacked such knowledge) would have changed Respondent's attitude toward Petitioner's use of cash collateral. Respondent *objected* to Petitioner's application to use cash collateral anyway, so its attitude could only have gotten better. Respondent only allowed Petitioner to use cash collateral because the bankruptcy court ordered it to do so, in return for which Respondent received super-priority status and additional collateral.

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* Again, the Third Circuit could only *assume* the bankruptcy court did not already know this.

Thus, the Third Circuit employed the doctrine of equitable estoppel, despite the existence of genuine issues of material fact, by assuming the fact of detrimental reliance.

Similarly, the doctrine of judicial estoppel requires a determination of facts that: in its bankruptcy case, Petitioner assumed a position that it had no claim against Respondent; and subsequent to its bankruptcy case, Petitioner assumed the contrary position. These are issues of material fact that require an examination of the facts and circumstances of the case, including the knowledge of the affected parties. By assuming the essential facts, the Third Circuit took an impermissible shortcut to the legal conclusion that judicial estoppel bars this lawsuit. (See also the dissenting opinion of Judge Stapleton at App. 22-24 as to the inapplicability of judicial estoppel.)

As part of its authority to review the procedures of lower federal courts, it is respectfully suggested that this Court should not permit the courts so to use procedural technisms to thwart the determination of the merits of significant claims to the detriment of debtors and unsecured creditors, when factual issues exist.

CONCLUSION

This Court should grant a *Writ of Certiorari* in order to review the important questions of Federal Law that are presented under the United States Bankruptcy Code and in order to nullify the Third Circuit's egregious disregard of the usual and accepted course of proceedings pursuant to the Federal Rules of Civil Procedure.

Respectfully submitted,

Allan H. Klinger
Counsel of Record
KLINGER, NICOLETTE,
MAVROUDIS AND HONIG

Dated: Oradell, New Jersey
September 29, 1988

APPENDIX TO PETITION FOR CERTIORARI

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5525

ONEIDA MOTOR FREIGHT, INC.,
a Corporation of the State
of New York,

Appellant

vs.

UNITED JERSEY BANK, a Corporation
organized under the Banking Laws
of the United States of America

-and-

UNITED JERSEY BANK, a New Jersey
Corporation,
Deft.-Third Pty. Pltf.

vs.

DONALD T. SINGLETON,
Third Pty. Deft.

Action for Referral to Bankruptcy Court

In re: ONEIDA MOTOR FREIGHT, INC.
Debtor, B.C. #85-03606(DV)

Appeal from the United States District
Court for the District
of New Jersey—Newark
(D.C. Civil No. 87-1440)

Argued
February 1, 1988
Before: SLOVITER, STAPLETON, and MANSMANN,
Circuit Judges

(Filed May 31, 1988)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Oneida Motor Freight, a Chapter XI debtor, appeals the dismissal of its contract and tort action against United Jersey Bank, a secured creditor. We must determine whether Oneida, seeking damages for the bank's alleged breach of certain loan agreements, is estopped from litigating this action by the preclusive effect of prior bankruptcy proceedings.

We conclude that Oneida violated both its statutory and fiduciary duty to disclose this current claim against the bank during the pendency of the bankruptcy case. By virtue of this failure to disclose, equitable and judicial estoppel operate against further litigation by Oneida. Accordingly, we shall affirm the order of the district court.

I.

Oneida Motor Freight, engaged in the interstate and intrastate trucking industry, and United Jersey Bank have maintained a banking relationship since 1983. In the course of their business dealings, the parties entered into two lending agreements. Under the terms of a "Revolving Credit Agreement", the bank would extend up to five million dollars in credit through loans and letters of credit. The parties also negotiated an "Accounts Receivable Security Agreement", whereby the bank would lend Oneida a percentage of Oneida's accounts receivable while maintaining a security interest in Oneida's accounts, equipment and inventory. The lending limits of these agreements have never been reached or exceeded.

In February 1985, Oneida settled a dispute which arose in connection with its acquisition of another trucking company, Dorn Transportation Company. In order to satisfy its obligations under the terms of the settlement, Oneida called upon the bank to pay certain outstanding letters of credit. Rather than charging against the letters of credit, however, the bank withdrew the necessary funds from Oneida's operating account. As a result, Oneida's account became habitually overdrawn. Nonetheless, at least for a period time, the bank honored Oneida's overdrafts.

In July 1985, the bank requested that the owner of Oneida, Donald Singleton, personally guarantee Oneida's debt. According to Oneida, when Mr. Singleton refused, the bank ceased honoring Oneida's checks. The dishonor of these checks allegedly compelled Oneida, on July 10, 1985, to file a petition under Chapter XI of the Bank-

ruptcy Code. Oneida then ceased its operations and proceeded with liquidation.

On July 11, 1985, the bank filed a motion for relief from the automatic stay entered in the bankruptcy proceeding. The application for relief further sought an order establishing the validity and extent of the bank's lien. On that same date, Oneida requested permission of the bankruptcy court for Oneida to use cash collateral of the bank, which was granted.

A series of subsequent orders was entered by the bankruptcy court in regard to matters pertaining to Oneida's and the creditors' rights, including, on September 30, 1985, a stipulation and order confirming a settlement among the bank, Oneida and the official unsecured creditors' committee. This order provided for an unconditional payment by Oneida to the bank in the amount of $6,650,000. Thereafter, on January 14, 1986, an order and a judgment were entered by the bankruptcy court, further detailing the extent and validity of the bank's lien. In this order, the amount due the bank by Oneida was established at $7,631,322.73 an amount already paid in full.

On August 14, 1986 the bankruptcy court entered an order confirming Oneida's Joint Plan of Reorganization. Nowhere in the plan or in the confirmation order is reference made to Oneida's current claim against the bank.[1]

Approximately seven months later, on March 11, 1987, Oneida commenced this action against the bank in the Su-

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1. After the present action was filed in state court, the plan was modified to order that one-third of the net recovery that Oneida might obtain against the bank in this lawsuit be paid to the creditors.

perior Court of New Jersey. In its complaint, Oneida alleged breaches of the credit agreements, of the parties' course of dealing and of the bank's duty of good faith. Oneida also set forth a cause of action in tort for fraudulent misrepresentation on the part of the bank and its agents. Oneida alleged that the bank's prior assurances, coupled with its dishonor of certain checks "without notice" denied Oneida an adequate opportunity to seek alternate financing to satisfy the payees of the dishonored checks. Oneida additionally asserted that the actions of the bank seriously damaged its business reputation with its customers and creditors. Oneida cited these improper activities by the bank as the catalyst for its Chapter XI filing.

The bank filed an answer and a third party complaint against Donald Singleton, Oneida's sole shareholder.[2] The bank then removed the action to the U.S. District Court for the District of New Jersey.

On May 14, 1987 the bank moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), failure to state a claim upon which relief can be granted, and/or Rule 12(c), motion for judgment on the pleadings. The district court, after argument, dismissed the complaint. The court held that since Oneida's claims against the bank arose from the same series of transactions which were the subject of the extensive prior bankruptcy proceedings, its failure to bring this particular claim to the bankruptcy court's attention violated fundamental principles of preclusion and barred Oneida from proceeding with the action.

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2. By order of June 24, 1987, the district court granted Singleton's motion to dismiss the third party complaint.

Oneida filed a notice of appeal from this final decision of the district court. We have jurisdiction under the authority of 28 U.S.C. § 1291.

The historical facts are undisputed. It is the preclusive effect of the bankruptcy proceeding upon this current action, if any, which is contested; resolution involves interpretation of legal precepts over which we invoke our power of plenary review.[3]

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3. The bank captioned its motion as, alternatively, a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and/or Rule 12(c). The district court granted the bank's motion without comment as to which procedural rule it applied.

Oneida argues that the motion should have been handled as a motion requesting summary judgment and asserts that the presence of unresolved factual matters mandate that the order entered in the bank's favor be reversed.

The district court characterized this argument as "irrelevant" since its decision was based on the legal question of the preclusive effect of the bankruptcy proceeding. The court then determined that no discovery was necessary for Oneida to defend against the bank's res judicata argument.

In deciding the merits of Oneida's argument, we are unable to discern which precise facts the district court relied upon, *i.e.*, what comprised "the current record." Under either motion, however, the district court had to examine the record of the prior bankruptcy proceeding. Indeed, the district court was entitled to take judicial notice of these matters in rendering its decision, regardless of the motion employed. Green v. Warden, U.S. Penitentiary, 699 F.2d 364 (7th Cir. 1983); 2A J. Moore, J. Desha Lucas and G. Grotheer, Moore's Federal Practice ¶ 12.15 (2d ed. 1987).

Review of the legal component for either of the motions is identical—since the material facts here are the undisputed historical facts—we determine, as did the district court, whether the moving party, the bank, is entitled to judgment as a matter of law.

II.

A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to satisfy a companion duty to schedule, for the benefit of creditors, all his interests and property rights. *In Re Hannan,* 127 F.2d 894 (7th Cir. 1942).

Section 521 of the current Bankruptcy Code outlines a non-exhaustive list of the debtor's duties in a bankruptcy case. Foremost for our purposes, the debtor is required to "file a . . . schedule of assets and liabilities . . . and a statement of the debtor's financial affairs. . . ." 11 U.S.C. § 521(1)(1978).

An additional obligation is imposed by 11 U.S.C. § 1125(b) mandating the filing of a disclosure statement containing "adequate information." Section 1125(a) defines adequate information as follows:

> § 1125. Postpetition disclosure and solicitation
>
> (a) In this section—
>
> (1) "adequtae information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. . . .

Concomitant with these prescribed duties is the debtor's "absolute and unlimited right to be heard in reorganization proceedings." *Southmark Properties v. Charles House Corp.,* 742 F.2d 862, 871 (5th Cir. 1984).

We regard the right-conferring language of *Southmark* as confirmation of the debtor's express obligation of candid disclosure. The preparing and filing of a disclosure statement is a critical step in the reorganization of a Chapter XI debtor. One commentator, citing the relevant legislative history, labeled this duty as the pivotal concept in reorganization procedure under the Code. 5 Collier on Bankruptcy ¶ 1125.03 (15th ed. 1988).

The importance of full disclosure is underlaid by the reliance placed upon the disclosure statement by the creditors and the court. Given this reliance, we cannot overemphasize the debtor's obligation to provide sufficient data to satisfy the Code standard of "adequate information."

From the legislative history of § 1125 we discern that adequate information will be determined by the facts and circumstances of each case. H.R. Rep. No. 595, 97th Cong., 1st Sess. 266 (1977). It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy contest. *Monroe County Oil Company v. Amoco Oil Co.*, 75 B.R. 158 (Bankr. S.D. Ind. 1987). The result of a failure to disclose such claims triggers application of the doctrine of equitable estoppel, operating against a subsequent attempt to prosecute the actions. *In Re Galerie Des Monnaies of Geneva Ltd.*, 55 B.R. 253 (Bankr. S.D. N.Y. 1985), *aff'd*, 62 B.R. 224 (Bankr. S.D. N.Y. 1986).

A strong interest to achieve finality pervades Chapter XI arrangements. *Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703 (2d Cir. 1983). This goal of finality was supported by the Supreme Court in *Stoll v. Gottlieb*,

305 U.S. 165 (1938), holding that confirmation of a plan acts to bar attempts by the parties to relitigate any of the matters that could have been raised during the bankruptcy proceedings. 5 Collier on Bankruptcy ¶ 1141.01(1) (15th ed. 1988). *See also, In Re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir. 1985), *cert. denied,* 474 U.S. 1033 (1985).

Disclosure is important, in this case, not only to the bank as an adversary and as a creditor, but to the other creditors and to the bankruptcy court. Here, "the silence" in the Oneida bankruptcy record concerning this present claim, as they say in the vernacular, "is deafening." In Schedule A-2 of its Statement of Financial Affairs required by § 521, Oneida acknowledged its debt to the bank in the amount of approximately 7.7 million dollars, without any mention of a setoff. The debt to the bank in part represented principal and interest due on the lending agreements, the alleged breach of which Oneida now seeks to place at issue. In the portion of the statement requiring enumeration of "contingent and unliquidated claims of every nature, *including counterclaims* . . .", Oneida listed only an unrelated accounts receivable claim of $6,827,030. (Emphasis added.) We conclude that the reorganization plan presented by Oneida to the creditors for confirmation, lacking disclosure of the potential for recovery against the bank, was informationally deficient, and not cured by the later modification.[4] The original plan failed to alert the creditors to the possible financial benefits enuring to them upon the successful prosecution of the claim.

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4. See supra note 1.

We can assume that revealing the potential action may also have impacted upon the bank's decision to enter into the stipulation establishing the extent and validity of its lien against Oneida and to vote for confirmation. The practical effect of a successful prosecution of Oneida's claim would be to require the bank to make restitution of the amount realized on its bankruptcy claim, since Oneida's present action calls into question the bank's right to collect its secured debt. This would also constitute a successful collateral attack on the bankruptcy court's order confirming the reorganization plan. In such circumstances, employment of equitable estoppel is required to preserve the integrity of the earlier proceedings, particularly where, as here, the creditors have reasonably acted in reliance upon the assumed finality and integrity of those adjudications. *County Fuel Company v. Equitable Bank Corporation,* 832 F.2d 290 (4th Cir. 1987).

In order to preserve the requisite reliability of disclosure statements and to provide assurances to creditors regarding the finality of plans which they have voted to approve, we hold that under the facts here present Oneida's failure to announce this claim against a creditor precludes it from litigating the cause of action at this time.

III.

Oneida asserts that it did not make known the presence of this cause of action during the course of the bankruptcy proceeding primarily because the bankruptcy matter was never in a procedural posture for a proper assertion of this claim.

Oneida argues that the bank's decision to commence a "contested matter" when requesting relief from the automatic stay rather than instituting an "adversary proceeding" foreclosed Oneida's obligation to raise this current claim. Oneida notes that Bankr. Rule 9014, governing contested matters, delineates other bankruptcy rules which can apply to contested matters. Rule 9014 does not, however, cross-reference Rule 7008, allowing for a debtor to raise affirmative defenses to a creditor's claim, or Rule 7013, allowing a debtor to assert counterclaims against a creditor.

Recognizing that Rule 9014 allows the bankruptcy court, at any stage in a particular matter, to direct that the unenumerated rules of Chapter VII shall apply, Oneida states that it could not raise its claim because the bankruptcy court did not utilize this permissive authority. We are somewhat surprised by this argument because the bankruptcy court was totally unaware that Oneida thought it had such a claim and the bankruptcy court was, therefore, never in a position to direct application of rules which might otherwise have been applicable.

Oneida further argues that it had no obligation to raise the claim when the bank sought relief from the automatic stay. Oneida cites several cases for the proposition that a motion for relief from stay, as brought by the bank under 11 U.S.C. §§ 362(d), is not the proper setting for adjudication of a counterclaim. *See, e.g., In Re Lexington Racquetball Club, Inc.*, 58 B.R. 103 (Bankr. E.D.Pa. 1986); *In Re Transleisure Corp.*, 41 B.R. 201 (Bankr. E.D.N.Y. 1984). Despite these cases, it is clear that while stay proceedings may not be proper for adjudication of a counter-

claim, a party may, nevertheless, raise its counterclaim at that time. One court noted:

> The Court fully agrees that a preliminary hearing under § 362 is not the proper time or place for a full *adjudication* of the trustee's clams against the creditor. . . . However, there is a tremendous difference between *adjudication* of the merits and mere *consideration* of counterclaims and defenses.

In Re Tallywell Services, Inc., 45 B.R. 149, 151 (Bankr. E. D.Mich. 1984). S. Rep. No. 95-989, 95th Cong., 2d Sess. 66 (1978).

The next procedural event providing an opportunity to bring this present claim to the forefront in the bankruptcy proceeding occurred when a hearing was held regarding Oneida's request, opposed by the bank, for use of cash collateral. After testimony, the parties consented to a cash collateral arrangement and partial vacation of the automatic stay which were memorialized in the bankruptcy court's order of July 25, 1985. It is not unreasonable to conclude that neither the bankruptcy court, nor particularly the bank, would have agreed to allow Oneida to utilize the collateral in the hands of the bank if a question as to the bank's threshold right to the funds was put at issue.

Oneida also asserts that it had no obligation to raise the claim when the bankruptcy court entered orders confirming validity of the bank's loan. Four separate orders were entered regarding the validity, priority and extent of the bank's claim against Oneida. The end result of these orders was the establishment and confirmation of the amount of the bank's claim for 7.7 million dollars. No affirmative defenses, counterclaims or objections to the claim

were pleaded or raised in connection with entry of these orders. Oneida contends that these orders involve different causes of actions than those presented by the district court complaint, and thus did not provide an opportunity to raise its defense to the claim. As we discuss later, we reject this argument of Oneida's, finding instead that the two claims stem from the same transaction, *i.e.*, alleged breaches of the loan agreement present an issue of fact common to the matters before the bankruptcy court in determining the extent and validity of the bank's lien based on the loan agreement.

Although Oneida may be technically correct in its argument that it was never *procedurally* compelled to raise its claim, we are satisfied that its failure to mention this potential claim either within the confines of its disclosure statement or at any stage of the bankruptcy court's resolution precludes this later independent action. Even absent a specific mandate to file a counterclaim, complete disclosure is imperative to assist interested parties in making decisions relevant to the bankrupt estate.

IV.

We are also mindful of the equitable concept of judicial estoppel. This doctrine, distinct from that of equitable estoppel, applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted. Judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation. *Scarano v. Central Railroad Co.*, 203 F.2d 510 (3d Cir. 1953); *USLIFE Corp. v. U.S. Life Insurance Co.*, 560 F. Supp. 1302 (N.D. Tex. 1983).

We conclude that Oneida's failure to list its claim against the bank worked in opposition to preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect. Although we stop short of finding that, as the bank urges, Oneida's prior silence is equivalent to an acknowledgement that it did not have a claim against the bank, we agree that its current suit speaks to a position clearly contrary to its Chapter XI treatment of the bank's claim as undisputed.

Oneida argues that judicial estoppel is not applicable because the claims raised in this lawsuit are entirely different, factually and legally, from those matters addressed in the bankruptcy proceeding.[5] In light of Oneida's thres-

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5. This is the identical argument raised in both Oneida's contest of the district court's application of the preclusion principle of res judicata to this matter and Oneida's rationale for not raising its claim in the bankruptcy forum.

In reaching its decision to apply res judicata here, the district court indicated what we described in United States v. Athlone Industries, Inc., 716 F.2d 977 (3d Cir. 1984), as "a predisposition towards taking a broad view of what constitutes identity of causes of action—'an essential similarity of the underlying events giving rise to the various legal claims.' " *Id.* at 984, citing Davis v. United States Steel Supply, 688 F.2d 166, 1971 (3d Cir. 1982) (in banc), *cert. denied,* 460 U.S. 1014 (1983). Without further elaboration, the district court then found that the current claims for breach of contract and misrepresentation were part of the same cause of action before the bankruptcy court, thereby barring further litigation of the present suit.

Because the matter here originated as a bankruptcy petition and was adjudicated in a format peculiar to bankruptcy matters, comparison of the two actions is not susceptible to the four-step analysis outlined in *Athlone.* Rather, we scrutinize the totality of the circumstances in each action and then determine whether the primary test of *Athlone, i.e.,* essential similarity in the underlying events, has been satisfied. Since it is Oneida's

(Continued on following page)

hold assertion in its district court complaint that the bank's breach of the lending agreements was the catalyst to its Chapter XI filing, we are unpersuaded by this argument. The relative rights and obligations of these parties are embodied in the lending agreements and the parties' course of dealing. To be successful in this action, Oneida must demonstrate a deviation from the contracted-for and established business relationship—a deviation which would certainly call into question any rights which the bank could assert as a creditor of Oneida for obligations accruing under the lending agreements. *Cf. Paradise Hotel Corporation v. Bank of Nova Scotia,* No. 87-3318, slip op. (3d Cir. March 15, 1988) (debtor, after filing a voluntary bankruptcy petition, requested the bankruptcy court to stay a previously-filed involuntary petition; debtor's stated motivation was to preserve potential claims arising from filing of the involuntary petition to pursue these claims later).

V.

The district court, although focusing primarily upon basic principles of res judicata, properly stressed the debtor's special duty of candid disclosure when it granted the bank's motion to dismiss.

While the result of terminating this lawsuit may produce a harsh result to other creditors of Oneida whose

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threshold allegation that the bank's activity in connection with the lending agreements was the catalyst to Oneida's filing a Chapter XI petition, we are unpersuaded by Oneida's current position that the two actions represent unrelated events. In any event, because the concept of equitable estoppel in relation to the debtor's duty of disclosure is dispositive in this matter, we need not further address this issue.

claims have not been paid in full, we are mindful of our review authority here—we have been asked to rule only on the propriety of the district court's conclusion with respect to the bank. Although we focus our decision on estoppel by reason of failure to disclose, we cannot say that the district court erred in its result. We shall affirm the order of the district court.

STAPLETON, *Circuit Judge,* Dissenting:

Concern for Oneida's numerous unsecured creditors compels me to dissent from the court's disposition. Those creditors, as well as Oneida, stand to lose by virtue of that disposition. If Oneida had been able to foresee this court's novel application of equitable and judicial estoppel, it would have been able to protect itself against the loss the court today imposes upon it. Oneida's unsecured creditors, however, had no way of protecting themselves and should not be required to contribute towards a windfall for an alleged wrongdoer.

I.

The court professes to steer clear of the claim preclusion analysis that underlies the district court's decision. It does so, however, only in the wake of an analysis sounding as much in claim preclusion as in the estoppel theories it embraces, and in a fashion which reflects, at most, only minor quibbles with the district court's view. I therefore begin with a discussion of the claim preclusion issue.

In effectuating the indisputable public interest in finality in bankruptcy proceedings, courts apply ordinary rules of claim and issue preclusion in the bankruptcy context. *See e.g. Miller v. Meinhard-Commercial Corp.*, 462

F.2d 358, 360 (5th Cir. 1972); *Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp.*, 60 B.R. 412, 414 (D. V.I. 1986). Restatement (Second) of Judgments § 24(1) sets forth the general rule which respect to claim preclusion, stating that:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

The court is simply mistaken, as was the district court, to the extent it suggests that this principle directs the outcome reached in this case. Section 24(1) prohibits claim-splitting, which by definition occurs when a party who has once asserted a claim attempts to reintroduce the claim in another guise thereafter. Here, Oneida asserted no claim against the bank in the bankruptcy proceedings. Having made no previous attempt to pursue a claim against the bank, Oneida cannot now be said to be prosecuting, and forcing the bank to defend, a suit for the second time.

One might argue to greater effect that Oneida's claims are precluded because Oneida did not file a counterclaim in response either to the bank's proof of claim or to its motion to lift the automatic stay and determine the extent and validity of its lien. Section 22(2) of the Restatement (Second) of Judgments states:

> A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

> (a) the counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or
>
> (b) the relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

For me, analysis of this case under this applicable legal principle dispels any doubt about whether it is barred by claim preclusion. As the majority acknowledges, no compulsory counterclaim statute or rule required Oneida to assert its claim in the bankruptcy proceedings. Because the bank's motion to establish the validity and extent of its lien and to lift the automatic stay gave rise to contested, rather than adversary proceedings, Bankruptcy Rule 9014 governed and Fed. R. Civ. P. 13(a)[1] was inapplicable absent explicit court direction to the contrary. The court issued no such direction. Similarly, while the Code calls for the disclosure of claims, as we discuss hereafter, no Code provision requires that the debtor actually litigate in the bankruptcy proceedings any claim the debtor happens to have against one of its creditors.[2] Indeed, as noted in our

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1. Rule 13(a) states that: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurence that is the subject matter of the opposing party's claim . . ."

2. The absence of such a rule is consistent with § 553, the Code's setoff provision. Section 553 permits a creditor to exercise a right of setoff, but does not require the creditor to do so. The absence of a rule also is consistent with our recent decision in *Paradise Hotel Corp. v. Bank of Nova Scotia,* No.

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subsequent discussion, Oneida's reorganization plan provides by its very terms, *See* Article XII, App. at 146,[3] that all claims and causes of action of Oneida's not expressly released or terminated in accordance with the plan may be prosecuted by Oneida or the Creditor's Committee after entry of the confirmation order.

Nor can it be said that Oneida's decision to prosecute its claims now, after the close of the bankruptcy proceedings, threatens to undermine a judgment of the bankruptcy court and thus that Oneida's claims should be barred on that basis. *See* Restatement (Second) of Judgments § 22(2)(b).[4] While the court suggests that such a danger is presented by the facts of this case, I fail to see the logic of its argument. The bankruptcy court entered orders re-

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87-3318, slip op. (3d Cir. March 15, 1988), where we held that a debtor who believes that an involuntary bankruptcy proceeding was filed against it in bad faith may pursue its remedies after bankruptcy, rather than relying exclusively on the relief provided by the Code in § 303(i)(2).

3. Article XII is quoted, *infra*, at 8.

4. In two cases cited by the court, *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 871 (5th Cir. 1984) and *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir. 1987), courts of appeal held that claims were barred by claim preclusion in contexts where granting relief would have been inconsistent with findings of fact or conclusions of law supporting the judgment in a prior case or would have effectively rescinded relief granted in a prior case. Both holdings are supported by the principle set forth in § 22(2)(b). In *Southmark*, the debtor sought to collaterally attack an order authorizing and confirming a sale of property to the debtor's mortgagee. In *County Fuel Co.*, the debtor attempted to raise claims that, had they been successfully raised when the creditor moved for removal of the automatic stay, would have cause the court to reject the motion.

flecting the undisputed facts that the bank had loaned Oneida more than $7.6 million, that Oneida was indebted to the bank to that extent, and that the bank's lien on Oneida's property securing that amount was valid. Oneida had no basis for contesting its debt to the bank or the validity of the bank's lien and, accordingly, it did not contest the bank's applications to the bankruptcy court. Oneida now seeks to prosecute behavior by the bank, occurring after the loaning of the $7.6 million, which Oneida believes was both impermissible and directly responsible for the circumstances that led to its bankruptcy. Resolution of the question of the propriety of the bank's behavior in Oneida's favor and entry of a judgment against the bank on Oneida's claims would be entirely consistent with the determinations of the bankruptcy court that Oneida had a duty to repay the $7.6 million loaned to it and that the bank's security interest had been perfected.[5] Accordingly, I would conclude that Oneida's failure to raise its present claim as a counterclaim in the bankruptcy proceeding did not undermine the bankruptcy court's orders.

Thus, I conclude that Section 22(2) of the Restatement sets forth the applicable rule of claim preclusion

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5. There is not even a significant overlap of the evidence crucial to the motions decided in the bankruptcy court and the evidence necessary to an analysis of Oneida's current claims. The bankruptcy court's determinations required consideration of the credit agreement, the value of the liens on Oneida's property and accounts receivable, and the question whether the bank properly perfected its liens. Oneida's current claims on the other hand, would necessitate investigation of the bank's behavior immediately prior to Oneida's filing in Chapter 11. With the exception of the credit agreement itself, the evidence adduced in the bankruptcy court would likely be irrelevant to this investigation.

and that application of that rule to the facts of this case requires a conclusion that Oneida's claim is not precluded.

II.

I would also reject the equitable and judicial estoppel theories on which the court places express reliance in foreclosing Oneida's claims. The court's reasoning, in short, is that Oneida forfeited its claims when it did not list them in its disclosures pursuant to § 521, which requires every debtor to file a schedule of assets, and § 1125, which imposes a similar obligation on a debtor soliciting acceptance of a reorganization plan. In my view, the court's analysis and the remedy it endorses ignore the purposes of the Code's disclosure requirements.

The Code's disclosure requirements are intended to protect those creditors whom a debtor's failure to disclose hidden assets would prejudice. A *fortiori,* a court's response to nondisclosure should do likewise. Not only does the court fail to safeguard the interests of Oneida's unsecured creditors, but it effectively penalizes them by foreclosing the prosecution of claims against the bank that would, if successful, result in a substantial enhancement of the estate and in their receiving more than the approximately thirty cents on the dollar for which they have been forced to settle. The only real winner in the case as decided is the bank, whom the court has relieved of the responsibility of justifying its allegedly improper behavior.

The court does not explain why it finds more even-handed alternatives inadequate. I see no reason, for example, why we could not allow this suit to proceed and simply make reference to the fact that the bankruptcy

court has jurisdiction to entertain motions to amend or rescind the debtor's reorganization plan if such motions are brought by unsecured creditors who feel that Oneida's nondisclosure has prejudiced them.[6] *See* § 350(b) ("A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."). The availability of such a course of action would in most cases adequately deter nondisclosure. Section 1141(d)(3), which authorizes denial of discharge under certain conditions, provides additional deterrence, as does 18 U.S.C. § 152 which makes it a crime, among other things, to "knowingly and fraudulently [conceal] . . . any property belonging to the estate of a debtor." *See e.g. 3 Collier on Bankruptcy* ¶ 521.02 (15th ed. 1986) (suggesting that concealment of an asset is subject to denial of discharge or criminal sanctions pursuant to 18 U.S.C. § 152).

Moreover, this case stands in marked contrast to the circumstances under which estoppel has traditionally been invoked. Here, Oneida never represented that it would not press a claim against the bank. On the contrary, starting with its initial disclosure statement and continuing throughout the Chapter 11 proceedings, Oneida made clear that it thought it had been mistreated by the bank.[7] Hav-

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6. At oral argument, we were advised that the Creditor's Committee had concurred in Oneida's decision to pursue its claims against the bank and that an application had been made to the bankruptcy court for a plan amendment that would provide for creditor participation in any recovery.

7. Oneida's disclosure statement charged the bank with:

> unilaterally with[drawing] Four Hundred Fifty Thousand Dollars ($450,000) from the Debtor's operating

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ing announced its displeasure at the outset, Oneida actively preserved its right to file claims. When the bank sought a general release in connection with the order establishing the extent and validity of its lien, for instance, Oneida's counsel wrote:

> While we would have no objection to an amendment of the Order to, in effect, delete the handwritten portion of the Order which was included per Judge DeVito's direction, the Order proposed by you constitutes an omnibus release pertaining to the matters far beyond the issue of service charges. Unless the Order is modified to pertain only to the issue of service charges, the matter cannot be resolved . . .

App. at 422. Oneida successfully secured exclusion of the release. Thereafter, Oneida's insistence on preserving any claims it might have never wavered, and culminated in Article XII of the reorganization plan itself:

> All claims and causes of action in favor of [Oneida] not expressly released or terminated in accordance with the Plan are hereby preserved and may be prosecuted by [Oneida] or the Creditors' Committee after entry of the Confirmation Order.

App. at 146.

Thus, Oneida never assumed a position which its current actions repudiate. *Compare Scarano v. Central R. Co.*

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> account to be applied towards satisfaction of the Dorn's settlement

and claimed that

> Said overdraft caused an immediate overdraft in the Debtor's account, which became a chronic situation until the filing of the bankruptcy proceedings.

App. at 109.

of New Jersey, 203 F.2d 510, 513 (3d Cir. 1953); *In re Galerie Des Monnaies of Geneva Ltd.*, 55 B.R. 253 (Bankr. S.D. N.Y. 1985), *aff'd* 62 B.R. 224 (S.D. N.Y. 1986) (debtor had affirmatively stated a belief it did not have preference actions, and would have been the only beneficiary of actions ultimately brought after bankruptcy). Nor has the bank pointed to any persuasive evidence that it was prejudiced by anything Oneida did or did not do during the bankruptcy proceeding.[8]

In sum, equitable and judicial estoppel are extraordinary remedies to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice. Oneida's behavior was neither inconsistent nor inequitable. Accordingly, I believe that the court should not have applied estoppel doctrines to this case.

III.

For the foregoing reasons, I would reverse the judgment of the district court.

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8. The court maintains that, had the bank known about Oneida's claims, it might not have entered into a stipulation as to the extent and validity of its lien, or voted for confirmation. I find it difficult to believe the bank was prejudiced in these respects, when undisputed evidence indicates that the bank was essentially paid in full by Oneida's plan. The bank's consent to the use of some of its cash collateral came prior to the filing of Oneida's statements of assets and liabilities and its disclosure statement and could not have been influenced thereby.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5525

ONEIDA MOTOR FREIGHT, INC., et al.,
Appellant

vs.

UNITED JERSEY BANK, et al.

SUR PETITION FOR REHEARING
(Filed July 1, 1988)

Present: GIBBONS, *Chief Judge,* SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Carol Los Mansmann
Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ONEIDA MOTOR FREIGHT,	)	
	)	Civil Action
Plaintiff,	)	No. 87-1440
	)	
v.	)	OPINION
	)	
UNITED JERSEY BANK,	)	(Filed July 6, 1987)
	)	
Defendant.	)	

SAROKIN, District Judge.

In this action by a bankrupt trucking company against its bank for breach of contract and misrepresentation, defendant United Jersey Bank moves to dismiss the complaint.

BACKGROUND

Plaintiff Oneida Motor Freight, Inc. (Oneida), a New York corporation founded in 1935, engaged in interstate trucking in the northeastern United States. On March 28, 1984, Oneida and defendant United Jersey Bank (the Bank) entered into two agreements: a Revolving Credit Agreement, whereby the Bank would extend up to $5 million in credit to Oneida through loans and letters of credit; and an Accounts Receivable Loan and Security Agreement, whereby the Bank would lend Oneida a percentage of Oneida's accounts receivable, with the Bank obtaining a security interest in Oneida's accounts, equipment, and inventory.

In February 1985, Oneida settled a dispute with Dorn's Transportation, a company that Oneida was ac-

quiring. Oneida, to pay its part of the settlement, called upon the Bank to pay certain outstanding letters of credit. According to Oneida, the Bank unilaterally withdrew the necessary funds from Oneida's operating accounts, rather than charging against the letters of credit as had been previously agreed. Thereafter, Oneida's account became habitually overdrawn and experienced deposits of uncollected funds. The Bank, however, repeatedly honored Oneida's overdrafts.

On July 2, 1985, the Bank requested that third-party defendant Donald Singleton, the owner of Oneida, personally guarantee Oneida's debt. Mr. Singleton refused. On July 5, 1985, the Bank ceased honoring Oneida's checks, including over $1 million in recently issued payroll checks. According to Oneida, the dishonor of these checks compelled it to file a Chapter 11 bankruptcy petition on July 10, 1985. Oneida, in a schedule filed with the petition, acknowledged an undisputed, liquidated, and non-contingent debt to the Bank of $7.7 million. Oneida immediately ceased operations and proceeded with a liquidation.

On July 11, 1985, the Bank filed a motion for relief from the automatic stay, to enforce its security interest, and for other relief. The Bankruptcy Court, by orders dated January 14 and March 3, 1986, established the extent and validity of the Bank's lien at over $7.6 million.

Also on July 11, 1985, Oneida moved for authority to use cash collateral of the Bank. On September 30, 1985, the Bankruptcy Court entered a Stipulation and Order confirming the parties' settlement of this application. The order provided for Oneida's use of up to $1.5 million in the Bank's cash collateral and the Bank's release of cer-

tain liens, expressly conditioned upon Oneida's payment by October 3, 1985 of over $6.6 million due to the Bank.

On May 12, 1986, Oneida filed an Amended Joint Plan of Reorganization under Chapter 11 in the Bankruptcy Court. The plan includes the Bank's deficiency claim, as a Class 9 creditor, for over $270,000. No objection to this claim has been filed. On August 14, 1986, the Bankruptcy Court entered an order confirming the amended joint plan.

On March 11, 1987, Oneida filed a complaint against the Bank in the Superior Court of New Jersey, Law Division, Bergen County, alleging breach of the financing agreements and misrepresentation surrounding the Bank's failure to honor Oneida's July 1985 checks. On April 15, 1987, the Bank filed a third-party complaint against Donald Singleton.[1] On April 20, 1987, the Bank removed this matter to this court pursuant to 28 U.S.C. § 1452(a).

The Bank moves to dismiss the complaint under Rules 12(b)(6) and 12(c).

DISCUSSION

The Bank's primary argument for dismissal,[2] though

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1. The court, by order dated June 24, 1987, granted Singleton's motion to dismiss the third-party complaint.

2. The Bank moves pursuant to Rules 12(b)(6) and 12(c). Oneida contends that the motion is properly understood as a Rule 56 motion for summary judgment because the Bank relies on materials outside the pleadings, namely pleadings and orders from the bankruptcy court. The court finds the dispute irrelevant. Before the court is a legal question regarding the preclusive effect of the bankruptcy proceedings. The Bank may prevail on this motion if the current record supports a finding of preclusion. No discovery is necessary for Oneida to defend against the Bank's *res judicata* arguments.

made in several forms is that the prior proceedings of the bankruptcy court preclude Oneida's current claims.

At first blush, the determination of which law governs this issue appears straightforward—a federal court applies federal rules to determine the preclusive effect of a prior federal question judgment of another federal court. *See Seven Elves, Inc. v. Eskenazi,* 704 F.2d 241, 243 n.2 (5th Cir. 1983); C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4468 (1981 & Supp. 1986).

In applying this rule, however two questions arise. First, was the original judgment of the bankruptcy court a "federal question" judgment? Yes, answers the court. Though the bankruptcy court had to make some subsidiary state law determinations (such as the validity of the Bank's security interests), the court's orders were in the context of a Chapter 11 reorganization governed by federal bankruptcy law. Second, is it relevant that the current federal action, removed from state court, involves adjudication solely of state law claims? No, answers the court. Even if this action had not been removed, the state court would be bound by federal law in determining the preclusive effect of the bankruptcy court's federal question rulings—thus, *Erie* concerns of inconsistent state and federal results are not present.

The court, therefore, applies federal rules of preclusion to the Bank's motion.

As stated above, the Bank's principal contention is that the prior bankruptcy proceedings preclude Oneida's current claims. The "claim preclusion" branch of the *res judicata* doctrine, in part, bars relitigation of claims actually litigated in a prior proceeding. In this matter, how-

ever, plaintiff's state law claims have never been actually litigated—they were neither presented nor adjudicated in any bankruptcy proceeding.[3] The *res judicata* doctrine, however, also precludes any claim which might have been included in that action. *See, e.g., Donegal Steel Foundry Co. v. Accurate Prods. Co.*, 516 F.2d 583, 587 (3d Cir. 1975); *Recchion v. Kirby*, 637 F. Supp. 284, 286 (W.D. Pa. 1985). The Bank's preclusion argument, in essence, is that Oneida's failure to raise its contract and misrepresentation claims in the bankruptcy proceedings bars the current suit.[4]

The Bank, to prevail on its res judicata argument, must demonstrate 1) that the bankruptcy proceedings constitute a final judgment on the merits; 2) that these proceedings involve the same parties as the current suit; and 3) that the current suit is based on the same "cause of action" as that adjudicated in the bankruptcy court. *See Purter v. Heckler*, 771 F. 2d 682, 690 (3d Cir. 1985); *United States v. Athlone Inds.*, 746 F. 2d 977, 983 (3d Cir. 1984).

Under this framework, the Bank's argument hinges on whether plaintiff's current claims and the claims pre-

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3. Therefore, the Bank's collateral estoppel argument fails. The issues involved in plaintiff's claims were not actually litigated in the bankruptcy court, as would be required for collateral estoppel (or "issue preclusion") to apply. *See, e.g., Haize v. Hanover Ins. Co.*, 536 F.2d 576, 579 (3d Cir. 1976).

4. That the Bank's motion turns on the question of which claims should have been litigated in a prior federal bankruptcy proceeding supports the court's ruling that federal rules of preclusion apply to this motion. Thus, the court does not apply the New Jersey "entire controversy" doctrine.

sented to the bankruptcy court are part of the same "cause of action."[5] The Third Circuit has explained its approach to this elusive concept.

> Although we declined to adopt *one* specific legal theory in [*Davis v. United States Steel Supply*, 688 F. 2d 166 (3d Cir. 1982) (en banc), *cert. denied*, 460 U.S. 1014 (1983)], we indicated a predisposition towards taking a broad view of what constitutes identity of causes of action—"an essential similarity of the underlying events giving rise to the various legal claims." We therefore do not adhere to any mechanical application of a single test but instead focus on the central purpose of the doctrine of res judicata. We are thus keeping with "[t]he present trend . . . in the direction of requiring that a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence."

United States v. Athlone Inds., 746 F. 2d 977, 984 (3d Cir. 1984) (citing 1B J. Moore & J. Wicker, *Moore's Federal Practice* ¶0.410[1], at 359 (2d ed. 1983)). Restatement (Second) of Judgments § 24(1) represents the "present trend," and states that a judgment in a prior action extinguishes any claims "with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."

The court, applying this broad transactional view, finds that Oneida's current claims and the claims presented in the bankruptcy court, are parts of the same "cause of action." Oneida contends that the claims in-

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5. There is no dispute that the bankruptcy orders constitute final judgments on the merits in a prior suit between the same parties.

volve different transactions—its current claims for breach of contract and misrepresentation focus on the Bank's conduct in failing to honor overdraft checks, while the bankruptcy proceedings centered on the creation of the bank's security interest and the validity of that interest. The court finds, however, that at the least, the claims arise from "a series of connected transactions," thus satisfying the Restatement test. *See Southmark Properties v. Charles House Corp.*, 742 F. 2d 862, 871 (5th Cir. 1984) (applying the Restatement position in a bankruptcy context).

Oneida contends, though, that *res judicata* cannot bar its current claims because it had no opportunity to raise those claims in the bankruptcy proceedings.

As an initial matter, the bankruptcy court would have had subject matter jurisdiction to hear Oneida's state law claims. A bankruptcy court may hear "all core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157 (b)(1). "Core proceedings" specifically include "counterclaims by the estate against persons filing claims against the estate." 28 U.S.C. § 157(b)(2)(C).

Oneida argues, however, that it could not have raised, or was not obligated to have raised, its claims in any of the proceedings which resulted in orders of the bankruptcy court. With respect to the August 14, 1986 order confirming the amended joint plan of reorganization, plaintiff contends that the "Reservation of Claims" provision[6]

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6. Article XII of the amended plan reads:

> All claims and causes of action in favor of the Debtor and Debtor-in-Possession not expressly re-

(Continued on following page)

makes plain that it had no obligation to raise its fraud claims in the confirmation proceedings. With respect to the proceedings resulting in the orders establishing the validity of the Bank's lien,[7] Oneida contends that a counterclaim could not have been properly brought such proceedings. Oneida's position is that the Bank initiated these proceedings as a motion for relief from the automatic stay under § 362; that such a motion is a "contested matter" under Bankruptcy Rule 9014; that Rule 7013, dealing with compulsory counterclaims, is not applicable in such a proceeding; and that, even if counterclaims are permissible, "the defensive and informal nature of [§ 362] stay litigation should . . . preclude the formal assertion of counterclaims." 2 Collier on Bankruptcy ¶362.08[3], at 362-67 (15th ed. 1986).[8]

Oneida's contentions, even if accepted, do not rebut the Bank's *res judicata* argument. As stated above, that doctrine requires that "a plaintiff present in one suit all the claims for relief" that he may have arising from a transaction. *See United States v. Athlone*, 746 F. 2d 977 (3d Cir. 1984) (citation omitted). Though Oneida is not the

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(Continued from previous page)

leased or terminated in accordance with the Plan are hereby preserved and may be prosecuted by the Debtor or the Creditor's Committee after entry of the Confirmation Order.

7. These are the orders of January 14 and March 3, 1986, and the September 30, 1985 stipulation and order of settlement in connection with Oneida's application to use cash collateral.

8. The Bank contends that its application, which also sought a determination of the validity of its lien, is properly considered as an "adversary proceeding" under Rule 7001, in which Oneida would have had the opportunity and obligation to bring its counterclaims under Rule 7013.

"plaintiff" in all the proceedings involved here,[9] Oneida was under an obligation—to the court, to the Bank, and to its creditors—to raise its claims against the Bank in the bankruptcy proceedings.[10]

Oneida does not and cannot contend that it had no opportunity during the bankruptcy proceedings to advise the court or the Bank of its intent to bring these claims. The bankruptcy court, if so advised, could have determined the proper procedural mechanism for Oneida to puruse its claims. The Bank, if so advised, could have (and represented at argument that it would have) objected to the confirmation of the reorganization plan. Under these circumstances, Oneida's failure violates a fundamental principle of current preclusion doctrine—that courts and parties should be able to rely on a final judgment as the end of all litigation with respect to a particular transaction or occurrence.

Oneida's current claims against the Bank arise from the same transaction, or series of connected transactions, as was the subject of extensive prior bankruptcy proceedings between these parties. Oneida's failure to bring to the court's attention claims against the Bank, of which Oneida was aware before the bankruptcy proceedings commenced, bars its current action.

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9. For example, the Bank moved for relief from the stay and for a determination of the validity of its lien; Oneida, if it had raised its claim, would have done so defensively as a counterclaim.

10. Oneida, at argument, stated that it advised the creditors', at their first meeting, of its bad faith and contract claims against the Bank. The court holds that Oneida, by such action, cannot be said to have raised its claims in the bankruptcy proceeding.

CONCLUSION

A debtor in a bankruptcy proceeding owes a special duty of disclosure to the court and creditors. Decisions are made by both predicated upon such disclosures by the debtor. Even absent a specific duty to file a claim or counterclaim, it is difficult to envision that a debtor can decline to reveal the existence of a claim and the intent to pursue it, particularly when it asserted against a named creditor.

The court grants defendant United Jersey Bank's motion to dismiss plaintiff's complaint.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: July 6, 1987

Original to Clerk, U.S. District Court

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ONEIDA MOTOR FREIGHT,	)	Civil Action
	)	No. 87-1440
Plaintiff,	)	
v.	)	ORDER
	)	
UNITED JERSEY BANK,	)	
	)	(Filed July 6, 1987)
Defendant.	)	

This matter having been opened to the court on the defendant's motion to dismiss the complaint; and the court having considered the written submissions and heard oral argument; and for the reasons expressed in the accompanying opinion,

IT IS this 6 day of July, 1987, hereby

ORDERED that defendant's motion to dismiss plaintiff's complaint is granted, and it is further

ORDERED that plaintiff's complaint is dismissed with prejudice.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Supreme Court, U.S.
FILED
NOV 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-579

In The

Supreme Court of the United States

October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, a New Jersey Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant a petition for certiorari to review a decision of the United States Court of Appeals for the Third Circuit which affirmed the District Court's dismissal of a debtor's complaint against its secured lender on the express basis that the debtor violated both its statutory and fiduciary duty to disclose these claims during the pendency of the debtor's extended bankruptcy proceedings, applying principles of equitable and judicial estoppel against the debtor?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 28.1, respondent United Jersey Bank states that it is the wholly-owned subsidiary of United Jersey Banks and is affiliated with each of the following corporations:

First Valley Corporation
- First Valley Bank
  - Valbeth, Inc.
  - North-Val, Inc.
  - Lehigh Securities Corporation
  - First Valley Capital Corporation
  - Affiliated Financial Advisors, Inc.

First Valley Financial Services, Inc.
First Valley Life Insurance Company
First Valley Leasing, Inc.
The Hazleton National Bank
Hanover Bank of Pennsylvania
Valprop, Inc.
- FirstVal Properties, Inc.

West Side Bancorp, Inc.
- West Side Bank

Franklin Commercial Corporation of New Jersey
- CCF Technologies, Inc.

Franklin Safe Deposit Corporation
Rahway Avenue Urban Renewal Corporation
Richard Blackman & Co., Inc.
Trico Mortgage Company, Inc.
UJB Credit Corporation
- Gibraltar Corporation of America
- United Jersey Leasing Company
- United Jersey Mortgage Company
  - United Jersey Corporation
- Asset Management Corp.
  - J. & M. Realty Corporation

UJB Financial Corp.
- First Pipco, Inc.
- UJB Leasing Corporation
- United Jersey Hackensack Investment Corporation

United Jersey Bank/Central, N.A.
- FSB Investment Corporation
- Franklin State Armored Corporation
- United Jersey Princeton Investment Corporation

United Jersey Bank/Commercial Trust
- CTC Investment Co.
- S. A. R. Realty Holding Corporation

United Jersey Bank/Edgewater National
- ENB Investment Co.

United Jersey Bank/First Colonia
- Colonia Investment Co.

United Jersey Bank/Mid State
- United Jersey Mid State Investment Corporation

United Jersey Bank/Northwest
- United Jersey Northwest Investment Corporation

United Jersey Bank/South, N.A.
- Lenape Financial Services Corporation
- United Jersey South Investment Corporation

United Jersey Bank/Wood Ridge National
- WRNB Investment Co.

United Jersey Credit Life Insurance Company

United Jersey Insurance Agency, Inc.

United Jersey Venture Capital, Inc.

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No. 88-579

In The

Supreme Court of the United States

October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, a New Jersey corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action arises out of the lending and banking relationship between petitioner Oneida Motor Freight, Inc. ("Oneida") and respondent United Jersey Bank ("UJB"). From approximately

February, 1985 through July, 1985, Oneida's operating account at UJB became habitually overdrawn. On or about July 5, 1985, UJB ceased honoring checks drawn on uncollected or overdrawn funds in light of the rapid and extensive deterioration of Oneida's financial condition.

On July 10, 1985, Oneida filed a voluntary petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code. Thereafter, Oneida, under oath and penalties of perjury, filed its Schedules and Statement of Financial Affairs with the Bankruptcy Court. In Schedule A-2, Oneida *acknowledged* its debt to UJB in the amount of $7.7 million as undisputed, liquidated, non-contingent and without any claims of setoff. In its statement listing contingent and unliquidated claims of every nature, including counterclaims, Oneida did not include any potential claims against UJB.

Immediately upon the filing of the reorganization proceedings, Oneida discontinued its motor freight operations and commenced liquidating its assets; however, Oneida required the use of $1.5 million of UJB's cash collateral in order to finance its plan of liquidation.

On July 11, 1985, UJB filed an application for relief from the automatic stay, to enforce security interests, to appoint a trustee, and in the alternative for conversion or dismissal of the Chapter 11 case. This application further sought an order establishing the validity and extent of UJB's lien. UJB also filed an objection to Oneida's use of cash collateral pursuant to 11 U.S.C. § 363(e).

On July 12, 1985, the Bankruptcy Court, on short notice, held a hearing on Oneida's application for authority to use cash collateral and UJB's objection to that application. On July 25, 1985, after having taken oral testimony, the Bankruptcy Court

entered an order *consented to by Oneida* authorizing Oneida's use of up to $1.5 million of UJB's cash collateral and providing adequate protection for UJB. The order specifically provided that Oneida's pre-petition loan agreement and security agreement with UJB were affirmed, ratified and adopted by Oneida (Respondent UJB's Appendix 2a, hereinafter "Resp. App.").

On September 19, 1985, the Bankruptcy Court entered a consent order modifying the cash collateral order of July 25, 1985 with the agreement of Oneida, Oneida's official unsecured creditor's committee (the "Creditors Committee") and UJB (Resp. App. 11a). This order modified the procedure for post-petition borrowing and specifically affirmed all other provisions of the July 25, 1985 order. On September 30, 1985, the court entered a stipulation and order confirming the settlement among UJB, Oneida, and the Creditors Committee (Resp. App. 14a). The September 30, 1985 order, which was also based upon the consent of Oneida, the Creditors Committee and UJB, became the foundation for Oneida's Plan of Reorganization in which UJB consented to treatment as an impaired creditor only with respect to reimbursement of all interest, costs, legal fees and recovery for any liability as issuer on outstanding letters of credit. That order also provided for the *unconditional* payment by Oneida to UJB of the sum of $6,650,000 which was thereafter paid (Resp. App. 16a).

On January 14, 1986, the Bankruptcy Court entered an order and judgment establishing the extent, validity and priority of UJB's lien (Resp. App. 18a). The order and judgment provided that there was due and owing by Oneida to UJB as of the filing of Oneida's bankruptcy petition the sum of $7,631,322.73 consisting of $5,891,897.74 principal, $107,174.99 interest to July 9, 1985 and letters of credit of $1,632,250.00, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness. The order provided that it was without prejudice

to Oneida's right to object to service fees charged by UJB, but did not reserve any other rights in favor of Oneida.

On March 3, 1986, the Bankruptcy Court entered an order supplementing the January 14, 1986 order (Resp. App. 20a). The order provided that the reservation of rights contained in the January 14, 1986 order would be terminated upon the payment by UJB to Oneida of the sum of $12,164.09 for service charges. In addition, the order provided that it constituted a final judgment for purposes of Rules 9021 and 8001 of the Rules of Bankruptcy Procedure. Pursuant to the terms of the order, the sum of $12,164.09 was thereafter paid to Oneida.

On August 14, 1986, the Bankruptcy Court entered an order confirming Oneida's Amended Joint Plan of Reorganization (Resp. App. 22a). Nowhere in Oneida's Plan of Reorganization or in the confirmation order is reference made to the claims alleged in the dismissed complaint against UJB. Based upon the stipulation and order entered on September 30, 1985, UJB did not oppose either separate classification and treatment, or confirmation of Oneida's Plan, and the Plan was substantially consummated. At no time prior to confirmation of its Plan did Oneida assert any challenge or counterclaim to UJB's filed proof of claim in the bankruptcy proceedings. Nearly seven months after the order of confirmation was entered, Oneida filed its complaint against UJB and obtained an order modifying its Plan *without notice to UJB.*[1]

This action was commenced by Oneida on March 11, 1987, in the Superior Court of New Jersey, Law Division, Bergen County, and alleges that UJB breached its loan agreement with Oneida, that it breached a course of dealing, that it breached its

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1. UJB's motion to vacate the order allowing the debtor to modify its Plan of Reorganization post-confirmation has been held in abeyance pending final determination of UJB's motion to dismiss Oneida's complaint.

duty of good faith, and that it made misrepresentations, which caused Oneida to file for bankruptcy. *None of these claims was raised by Oneida at any time during the pendency of its bankruptcy proceedings.* On July 6, 1987, the District Court (to which the complaint had been removed) dismissed Oneida's complaint against UJB. On May 31, 1988, the United States Court of Appeals for the Third Circuit affirmed. A petition for rehearing *en banc* was denied by the Third Circuit on July 1, 1988. On October 27, 1988, UJB moved in the Bankruptcy Court for an order to compel Oneida's compliance with the terms of its Plan as UJB has not yet received any distribution on its deficiency claim as is required under Oneida's confirmed Plan of Reorganization.

SUMMARY OF ARGUMENT

There is no reason for this Court to grant the petition for certiorari. The decision of the Third Circuit is entirely consistent with all other decisions from other circuits. There is no decision holding to the contrary. These courts have uniformly held that a debtor may not bring an action following confirmation of its reorganization proceedings when it does not disclose the existence of the claims during its bankruptcy case.

The decision of the Third Circuit is also consistent with the provisions and purposes of the Bankruptcy Code. A debtor is required to provide full and candid disclosure and has an absolute right to be heard during its bankruptcy proceedings. It would be completely contrary to the provisions and purposes of the Bankruptcy Code to allow a debtor to bring an action against a creditor following confirmation of its plan of reorganization when the debtor did not disclose the existence of the claims during the bankruptcy proceeding, in violation of its statutory and fiduciary duty to the court and its creditors.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI MUST BE DENIED AS THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

The Third Circuit's affirmance of the District Court's decision and order dismissing Oneida's complaint against UJB was based on well-settled principles of claim preclusion (equitable and judicial estoppel) and is completely consistent with prior holdings of this Court and other circuit and district courts. Oneida's claims to the contrary have no basis in law or in fact.

The Third Circuit's decision does not conflict with the decision of any other circuit, including the *single* Court of Appeals case cited by petitioner, *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988). In that case, the debtor did not include in its disclosure statement any discussion of the *potential* equitable subordination of a creditor's claim. The Fifth Circuit in *dicta* found that this omission did not render the information in the disclosure statement inadequate because at no time prior to or after approval of the debtor's disclosure statement did the debtor or any other party pursue the claim for equitable subordination. *Id.* at 1157. As was noted by the *Texas Extrusion* court, there is no reason to provide information about an action which is "mere conjecture." *Id.*

That situation is in stark contrast to the present case where Oneida commenced a lender liability action against UJB *after*: (1) the debtor had obtained Bankruptcy Court approval of a disclosure statement which made *no mention* of the debtor's alleged claims against UJB; (2) the Bankruptcy Court entered four separate

orders confirming the extent, validity and priority of UJB's liens and approving the settlement among UJB, the Debtor and the Creditors Committee; and (3) UJB, Oneida and the Creditors Committee agreed to the separate classification and treatment of UJB's claim in Oneida's Plan of Reorganization which incorporated by reference the terms of the stipulation and order entered on September 30, 1985. The Third Circuit's decision is actually consistent with the *Texas Extrusion* case since that court noted that while there was no need to disclose information about speculative lawsuits which were not being pursued by any party, actual claims are properly included in the debtor's disclosure statement. *Id.* at 1157. Clearly, there is no irreconcilable conflict between the circuits on the issues raised by this case.

The Third Circuit's opinion is entirely consistent with the decision of this Court in *Stoll v. Gottlieb,* 305 U.S. 165, *reh'g denied,* 305 U.S. 675 (1938), and with numerous other circuit and lower court decisions which the Third Circuit cited and relied upon in rendering its decision. *See County Fuel Oil Co. v. Equitable Bank Corp.,* 832 F.2d 290 (4th Cir. 1987); *In re Galerie des Monnaies of Geneva, Ltd.,* 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd,* 62 B.R. 224 (S.D.N.Y. 1986); *Monroe County Oil Co. v. Amoco Oil Co.,* 75 B.R. 158 (S.D. Ind. 1987). *See also, Republic Supply Co. v. Shoaf,* 815 F.2d 1046 (5th Cir. 1987); *In re Penn Central Transportation Co.,* 771 F.2d 762 (3d Cir. 1985), *cert. denied,* 474 U.S. 1033 (1985); *Southmark Properties v. Charles House Corp.,* 742 F.2d 862 (5th Cir. 1984)[2]; *Miller v. Meinhard Commercial Corp.,* 462 F.2d 358 (5th Cir. 1972). *See also, Katchen v. Landy,* 382 U.S. 323 (1966).

In affirming the District Court's dismissal of the debtor's

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2. The inapplicability of the *Texas Extrusion* case to the one now before the Court is highlighted by the fact that the Fifth Circuit did not even cite to its opinion in *Southmark Properties* in *Texas Extrusion*.

action on grounds of equitable estoppel, the Third Circuit relied upon *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir. 1987), where the Fourth Circuit held that:

> County Fuel's failure to object or to assert its claim as a counterclaim to Equitable's claim in the bankruptcy proceeding, followed by Equitable's satisfaction of the principal amount of its claims upon lifting of the automatic stay, followed by County Fuel's express concession of the validity of Equitable's principal claim in the course of objecting to its further claim for attorney's fees, suffices to preclude County Fuel's later independent actions.

Id. at 293.

The Third Circuit's decision is also consistent with *In re Galerie des Monnaies of Geneva, Ltd.*, 55 B.R. 253 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986). In that case, the debtor commenced an action against a bank to recover a series of allegedly preferential transfers. The preferences were not mentioned in the debtor's disclosure statement. The court, "in order to preserve the integrity of disclosure statements given the reliance that Congress, in enacting § 1125 of the Code, clearly expected creditors to give them," held that the debtor was estopped from prosecuting the preference actions on the basis of the debtor's failure to disclose its claim to creditors during its reorganization proceeding. 55 B.R. at 260.

Similarly, in *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158, 162 (S.D. Ind. 1987), the court applied the doctrine of equitable estoppel to bar claims brought by the debtor, Monroe, which were in existence during the debtor's bankruptcy proceedings but were not disclosed during those proceedings. The court held

that pursuant to 11 U.S.C. § 1125(b), a debtor must file a disclosure statement which contains "adequate information," including any litigation likely to arise in a nonbankruptcy context.[3] *Id.* Even though *Monroe* stated in its plan of reorganization that it retained "all causes of action it may have under the United States Bankruptcy Code," the court held that:

> When a debtor fails to disclose claims that it has during the bankruptcy proceedings, it is equitably estopped from bringing the claims after the approval of the plan of reorganization.

Id.

The Third Circuit's application *sub judice* of the doctrines of equitable and judicial estoppel is fully supported by the undisputed facts of this case. At no time during its extended bankruptcy proceedings did Oneida reveal to the court or UJB that it was planning to bring an action for lender liability. Oneida was therefore estopped from changing its prior position upon which UJB as its secured lender and the court relied.

Not only did Oneida fail to reveal its claims against UJB during its bankruptcy proceedings, it actually affirmatively represented that it had no such claims. The July 25, 1985 order, to which Oneida consented, specifically provided that the loan agreement and security interests were affirmed, ratified and adopted by Oneida (Resp. App. 2a). The September 30, 1985 order, to which Oneida consented, provided for the *unconditional*

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3. In fact, Oneida recognized the requirement that pending or contemplated litigation be disclosed in the disclosure statement and included Article VIII, entitled *Pending and Possible Litigation Affecting Distribution to Creditors* in its Disclosure Statement. Significantly, Article VIII does not make any mention of Oneida's alleged claims against UJB. Similarly, the Schedules of Assets also omits mention of any claim or counterclaim against UJB.

payment to UJB of $6,650,000 by Oneida (Resp. App. 14a-15a). The January 14, 1988 order and judgment established *the extent, validity and priority* of UJB's claim and provided that Oneida was indebted to UJB, as of the filing of its petition, in the sum of $7,631,322.73, together with accruing interest and allowed counsel fees on the aggregate indebtedness, subject *only* to Oneida's right to object to service fees charged by UJB (Resp. App. 18a-19a). The March 3, 1986 order, to which Oneida consented, provided that the reservation of rights provided for in the January 14, 1986 order was terminated and the order constituted a final order (Resp. App. 21a).

Applying well-established principles of claim preclusion to the undisputed historical facts of this case[4], the Third Circuit properly concluded that Oneida's "deafening silence" with respect to its alleged claim against UJB (Petitioner Oneida's Appendix 9, hereinafter "Pet. App."), "violated both its statutory and fiduciary duty to disclose this current claim against the bank during the pendency of the bankruptcy case." (Pet. App. 2). As a result of this failure to disclose, the doctrines of equitable and judicial estoppel were properly and necessarily invoked by the Third Circuit in order to preclude further litigation on the claim by Oneida,

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4. *See* Third Circuit Opinion (Pet. App. 6, n.3) and District Court Opinion (Pet. App. 28, n.2). Both the Third Circuit and the District Court held that resolution of this case involves only the legal question of the preclusive effect of the bankruptcy court's orders on Oneida's current claim (Pet. App. 6, n.3 and 28 n.2). The Supreme Court has often held that as a court of law, it will usually deny certiorari where review of a lower court decision is sought based upon the court's analysis of the particular facts of the case. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts."). This is particularly true where, as here, the findings of the District Court receive the concurrence of the Court of Appeals. *See, Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (very obvious and exceptional error must be shown). Clearly, no such obvious or exceptional error has been shown in this case.

and to preserve the finality and integrity of the Bankruptcy Court's orders (Pet. App. 8-9).

II.

THE THIRD CIRCUIT'S DECISION IS CONSONANT WITH THE BANKRUPTCY CODE'S PROVISIONS REQUIRING FULL AND COMPLETE DISCLOSURE AND THE DEBTOR'S ABSOLUTE AND UNLIMITED RIGHT TO BE HEARD.

Incredibly, an entire point of Oneida's argument is devoted to the proposition that Oneida's failure to disclose its alleged claim against UJB is somehow consistent with the Bankruptcy Code's policy of full and candid disclosure (Pet. 19-24). To state this argument is to refute it.

The debtor's duty to file a disclosure statement which provides full and candid disclosure has been described as the "pivotal concept" in reorganization procedure under the Bankruptcy Code. 5 *Collier on Bankruptcy* ¶ 1125.03 (15th Ed. 1988); *see* 11 U.S.C. § 1125(a). Under 11 U.S.C. § 1125(a), the disclosure statement must contain "adequate information" which is statutorily defined as:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor . . . that would enable a hypothetical investor typical of holders of claims or interests of a relevant class to make an informed judgment about the plan . . . .

11 U.S.C. § 1125(a)(1988).

Clearly, the information concerning Oneida's alleged claim

against UJB would have been extremely relevant and material to UJB's decisions to: (a) allow Oneida to use $1.5 million of UJB's cash collateral; (b) refrain from interposing any objection to Oneida's Plan of Reorganization, based on 11 U.S.C. § 1129(b). *See Norwest Bank Worthington v. Ahlers,* 485 U.S. ____, 108 S. Ct. 963, 99 L. Ed. 2d 169 (1988); and (c) withdraw its motion for appointment of a trustee and for conversion or dismissal of Oneida's bankruptcy case.

Under these circumstances, Oneida had an absolute duty to disclose its potential claims against UJB. *See* 11 U.S.C. § 1125(a); *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 871 (5th Cir. 1984); *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R. 158, 162 (S.D. Ind. 1987); *In re Galerie des Monnaies of Geneva, Ltd.*, 55 B.R. 253, 259 (Bankr. S.D.N.Y. 1985), *aff'd*, 62 B.R. 224 (S.D.N.Y. 1986).

Oneida's unlimited right to be heard in its bankruptcy proceedings, combined with the obligations of full and candid disclosure set forth in the Bankruptcy Code, 11 U.S.C. §§ 521 and 1125 (1988), clearly imposed a duty on Oneida to raise its claims against UJB during the bankruptcy proceedings. Instead, Oneida chose not to assert its claim at any time during its bankruptcy proceedings or extended settlement negotiations with UJB and used over $1 million of UJB's cash collateral on the basis of those settlements. Oneida cannot now undo that which it has freely chosen to do, nor can it now restore UJB and the Bankruptcy Court to the *status quo ante*.[5] *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1555 (11th Cir. 1988); *In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir.

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5. Based upon the Stipulation of Settlement entered on September 30, 1985, UJB released its liens and security interests in numerous motor vehicles owned by the debtor which were then sold to a third party pursuant to a Bankruptcy Court order. *See County Fuel Oil Co. v. Equitable Bank Corp., supra.*

1986); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981) (where no stay of a confirmation order is obtained, the mootness doctrine requires dismissal of an appeal which would allow a "piecemeal dismantling" of the reorganization plan and "knock the props out from the authorization of every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court.").

Oneida's argument that the Third Circuit's holding contravenes the purpose of the Bankruptcy Code is totally without merit. In fact, just the opposite is true as this case provides an illustration of how the Code's policies of rehabilitation of debtors and full disclosure would be completely frustrated if debtors were permitted to conceal potential claims against a creditor with whom the debtor was seeking a negotiated settlement. At the onset of Oneida's case, Oneida and UJB consented to an arrangement for the use of $1.5 million of UJB's cash collateral which included the acknowledgement by Oneida of the validity and extent of UJB's lien for over $7,600,000. It would be a contradiction of the expectation of the Bankruptcy Court and the lender to have the adequate protection order evaporate after the cash collateral was spent, and permit the debtor to then claim that the lender's refusal to advance funds before bankruptcy gave rise to a cause of action not merged in the order establishing the liens of UJB and providing adequate protection for such liens. Instead of providing adequate protection for the lender's benefit, such an order would reward a debtor for remaining silent and permit the debtor to subsequently ambush the creditor after having received the benefits bargained for. This result would prevent consensual agreements during the outset of a reorganization case and would frustrate the congressional policy toward rehabilitation of distressed debtors. *See In re Penn Central Transportation Co.*, 771 F.2d 762 (3d Cir.), *cert. denied*, 474 U.S. 1033 (1985).

It would be outrageously unjust to permit Oneida, which

induced UJB to forego its right to object to the use of over one million dollars of cash collateral, and to withdraw its motion for appointment of a trustee and for the conversion or dismissal of the bankruptcy case, to subject UJB to belated claims, as though the settlements were never made, and as though the bankruptcy court's orders were written in invisible ink. Such a result would make a mockery of the finality and integrity of bankruptcy court orders and eliminate the value of any judgment of that court, except after a complete trial. Thus, the Third Circuit's decision is completely consistent with the fundamental purposes of the Bankruptcy Code — the rehabilitation of debtors through full and candid disclosure to creditors upon which negotiated reorganization transactions may occur.[6]

No important federal question is presented by Oneida's petition since it was clearly not Congress' intention that the adequate information requirement of § 1125 would allow a debtor to provide anything less than full and candid disclosure to its creditors. The absence of such an important federal question further supports denial of Oneida's petition for certiorari. *Cf.*, *American Federation of Musicians v. Wittestein*, 379 U.S. 171, 175 (1964).

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6. It is to be noted that paragraph 10 of the July 25, 1985 consent order provides that: "The security interests and liens granted to United Jersey Bank hereunder and the obligations shall not be altered, modified, extended, impaired or affected by any Plan of Reorganization or by an Order of the Court unless consented to by United Jersey Bank in writing." (Resp. App. 7a).

III.

CERTIORARI IS NOT APPROPRIATE TO REVIEW A PRIVATE DISPUTE BETWEEN A CHAPTER 11 DEBTOR WHICH BREACHED BOTH ITS STATUTORY AND FIDUCIARY DUTIES TO THE COURT AND ITS CREDITORS.

The Third Circuit invoked principles of equitable and judicial estoppel against Oneida based upon an express finding that Oneida breached both its statutory and fiduciary duties to the court and its creditors by failing to disclose its alleged claims against UJB (Pet. App. 2). In this regard, the court stated that " 'the silence' in the Oneida bankruptcy record concerning this present claim . . . 'is deafening.' " (Pet. App. 9).

Since it is to be expected that other Chapter 11 debtors will comply with their express statutory and fiduciary duties in their own bankruptcy cases, certiorari is not appropriate in this case because Oneida's petition does not present any issues of importance to the public as contrasted with issues of importance to the individual parties involved in this action. *See Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923); *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955).

CONCLUSION

In sum, this case involves the application of well-settled principles of claim preclusion and equitable and judicial estoppel to an undisputed record of historical facts (Pet. App. 6, n.3 and 28, n.2). Further, the Third Circuit's decision is completely consistent with the decisions of this Court and other circuit and district courts. Oneida's petition for certiorari is a thinly disguised attempt to obtain another hearing on the very same arguments which were rejected by the Third Circuit and the District Court.

Dissatisfaction with the decisions of lower courts does not provide sufficient reason for the allowance of a writ of certiorari. *See Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."). Therefore, Oneida's petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM S. KATCHEN
Counsel of Record
CLAPP & EISENBERG
A Professional Corporation
Attorneys for Respondent
80 Park Plaza
Newark, New Jersey 07102
(201) 642-3900

Dated: November 1, 1988

WILLIAM S. KATCHEN
Of Counsel

WILLIAM S. KATCHEN
JOHN L. LASKEY
VINCENT F. PAPALIA
On the Brief

APPENDIX A — ORDER DATED JULY 25, 1985

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606(DV)

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER AUTHORIZING USE OF CASH COLLATERAL, GRANTING SENIOR LIENS PRIORITY ADMINISTRATIVE EXPENSE, AND OTHER RELIEF

This matter having been opened to the Court upon the application of the Debtor and Debtor-In-Possession for authority to use cash collateral pursuant to 11 U.S.C. Section 363, and a hearing, upon short notice pursuant to Court Order, having been held on July 11, 1985; Richard B. Honig, Esq. and David Nicolette, Esq. on behalf of the Debtor; William Katchen, Esq., Robert Nies, Esq., and Robert Mulligan, Esq. on behalf of United Jersey Bank; Robert Baime, Esq. on behalf of Turnpike Ford and Teamsters Local 707 and Novalyn L. Winfield, Esq. on behalf of the U.S. Trustee, and the Court having taken oral testimony on behalf of the Debtor and United Jersey Bank, and having

considered the legal arguments and objections, and good and sufficient cause appearing for the granting of the relief herein:

IT IS on this 25th day of July, 1985, ORDERED:

1. Pending further Order of this Court, the Debtor- In-Possession shall be authorized to use cash collateral, subject to the terms of paragraph 7 herein, to the extent of $750,000.00 (which amount includes $450,000.00 presently held by the debtor) for payment of pre-petition priority wages and payroll taxes and post-petition accrued payroll and payroll taxes; plus any additional amounts, up to $750,000 of cash collateral, subject to the terms of paragraph 7 herein, which shall be: (i) scheduled for disbursement a week in advance, upon notice to United Jersey Bank; (ii) subject to objection by United Jersey Bank and request for a Court hearing upon five (5) days notice; and (iii) not used by the Debtor-In-Possession pending final Court approval;

2. The pre-petition loan documents entered between United Jersey Bank and the Debtor, copies of which are annexed to United Jersey Bank's application for relief from the automatic stay, and all other loan docunentation between United Jersey Bank and the Debtor, together with the security interests created thereunder, be and hereby are affirmed, ratified and adopted by the Debtor and Debtor-In-Possession;

3. That the use and consumption by the Debtor and Debtor-In-Possession of the cash collateral subject to United Jersey Bank's liens, shall constitute a super priority administration expense claim, pursuant to section 507 (b) of the Bankruptcy Code, in favor of United Jersey Bank, senior to any and all claims against the Debtor and Debtor-In-Possession under 507 (a) of the Bankruptcy Code, whether in this proceeding or in any superseding proceeding,

including claims for professional fees and any other charges;

4. That all such obligations of the Debtor and Debtor-In-Possession shall be payable on demand in the event of a material breach or default in the terms of this Order;

5. That to secure repayment of any and all loans, advances or other amounts due and owing by the Debtor and Debtor-In-Possession to United Jersey Bank resulting from the use or consumption of cash collateral, and as an express condition for the use or consumption of cash collateral, to the extent provided as a replacement lien under sections 361 and 363 (e) of the Bankruptcy Code, the Debtor and Debtor-In-Possession, collectively, are authorized and, by this Order do hereby grant, convey and assign to United Jersey Bank a continuing first lien and security interest in all unencumbered property of the Debtor and Debtor-In-Possession, whether now existing or hereafter created, including but not limited to (i) all motor vehicles, trucks, tractors and trailers; (ii) five (5) terminal buildings and real estate owned by the Debtor at: 127 East Broad Street, Frankfort, New York; 477 Montgomery Street, Chicopee, Mass.; Rt. 22 B-Main Street, Morrisonville, New York; Terminal Road, Poughkeepsie, New York; Thompson Road, Dewitt, New York; (iii) one (1) additional terminal building and real estate at Main Street, Wells River, Vermont subject only to a valid, existing first mortgage, and (iv) all proceeds of the foregoing (i)-(iii), all of which property ("additional collateral") shall collectively cross-collateralize the obligations due and to become due from the Debtor and Debtor-In-Possession to United Jersey Bank resulting from (i) the use or consumption of cash collateral by the Debtor-In-Possession or (ii) from any injury, loss or decrease in value sustained by United Jersey Bank resulting from the Debtor and Debtor-In-Possession's use, sale or leasing of pre-petition collateral subject

to United Jersey Bank's pre-petition liens, as provided in section 361(2);

6. That United Jersey Bank be and hereby is granted relief from the stay provisions of section 362 (a) of the Bankruptcy Code to liquidate its pre-petition collateral and additional collateral created herein, provided: (i) pre-petition motor vehicle collateral shall not be sold for 60 days from July 25, 1985 unless consented to in writing by the Debtor and United Jersey Bank and following notice and hearing as required by sections 363 or 102 of the Bankruptcy Code, or as ordered; (ii) thereafter, United Jersey Bank is hereby authorized to sell the motor vehicle collateral, following notice and hearing, as required by sections 363 or 102 of the Bankruptcy Code, or as ordered, and to apply the proceeds of sale to satisfy United Jersey Bank's pre-petition debt of $7,631,322.73 consisting of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985, and letters of credit of $1,632,250, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness; (iii) adequate protection collateral created herein shall not be sold without the Debtor's consent prior to 180 days from July 25, 1985 and following notice and hearing as required by sections 363 or 102 of the Bankruptcy Code, or as ordered; (iv) thereafter United Jersey Bank is hereby authorized to sell the adequate protection collateral, following notice and a hearing, as required by sections 363 or 102 of the Bankruptcy Code, or as ordered, and to apply the proceeds of sale to satisfy United Jersey Bank's pre-petition debt of $7,631,322.73 consisting of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985, and letters of credit of $1,632,250, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness, and to satisfy the allowed super-priority claim of United Jersey Bank under section 507 (b) of the Bankruptcy Code arising from the Debtor-In-Possession's

use, sale or leasing of collateral; (v) the Debtor and Debtor-In-Possession shall be obligated to United Jersey Bank to the full extent of the letters of credit issued by United Jersey Bank and shall, at all times after liquidation of United Jersey Bank's pre-petition collateral, hold in escrow with United Jersey Bank, sufficient funds, other than funds realized from sale of pre-petition collateral, to satisfy the dollar amount of such letters of credit issued prior to termination thereof. Upon liquidation of such letters of credit United Jersey Bank is authorized to apply such escrowed funds to satisfy such claims arising from the payment of said letters of credit.

7. That the Debtor-In-Possession shall: (i) forward weekly reports to United Jersey Bank and the U.S. Trustee setting forth all monies received in payment of accounts receivable, and setting forth all disbursements, together with any documentation in support thereof; (ii) maintain all Debtor-In-Possession operating accounts with United Jersey Bank and remit to United Jersey Bank and deposit therein all receipts from collection of accounts receivable, both pre-petition and post-petition; (iii) provide United Jersey Bank with five (5) days prior notice of any weekly expenditures over $10,000.00 in total so that United Jersey Bank may object and request a court hearing, in its discretion, for any such expenditures; (iv) on or before July 19, 1985 provide hazard, loss and fire insurance on all collateral now existing or hereafter acquired, including proceeds, pursuant to this Order, in an amount equal to the indebtedness set forth in paragraph 6, with United Jersey Bank designated as loss payee, to the extent of its interest therein; (v) pay outstanding real estate taxes due and to become due on property listed in paragraphs 5 (ii) and (iii), and authorize United Jersey Bank to pay such taxes; to redeem any tax lien certificates thereon, and to advance necessary premiums for insurance coverage in paragraph (iv) herein, and to add said

amounts to the Debtor's and DebtorIn-Possession's obligations secured by the Bank's liens herein; (vi) employ, subject to further Court Order, watchmen, or other security personnel, in sufficient number to adequately protect and preserve the collateral now existing or hereafter acquired pursuant to this Order,and authorize United Jersey Bank, in its discretion and subject to further Court Order, to employ watchmen, or other security personnel, in sufficient number to adequately protect and preserve the collateral now existing or hereafter acquired pursuant to this Order, and to add said costs of preservation in the amount of the bank's indebtedness as set forth in paragraph 6 herein, and secured by the granting of post-petition security interest, pursuant to this Order;

8. That without the necessity of filing financing statements, mortgages or other documents, this Order shall be sufficient evidence of United Jersey Bank's perfected liens and security interests in and to the Debtor and Debtor-In-Possession's property as described herein and the Debtor-In-Possession is hereby authorized and directed to execute and to perform all acts to make, execute and deliver all instruments as may be necessary or appropriate to implement the terms and conditions of this Order and the transactions described herein, including but not limited to Uniform Commercial Code financing statements, mortgages and motor vehicle titles, and to pay such costs and expenses as may be reasonably required to evidence perfection of United Jersey Bank's security interests, as created herein. This Order may be filed and recorded by United Jersey Bank to protect the interests created herein, in lieu of filing of the Debtor's petition, with the same effect as if said petition had been filed and recorded, as authorized under section 549 of the Bankruptcy Code;

9. That the property securing United Jersey Bank's claims

shall not be subject to any claim or charge of the Debtor, Debtor-In-Possession, Creditors Committee, any Trustee or other fiduciary appointed or elected, any professional employed or retained by any of the aforementioned, or any costs, commissions or expenses, of whatever nature. All obligations of the Debtor and Debtor-In-Possession to United Jersey Bank now in existence or hereafter incurred shall have priority over all administrative expenses of the kind specified in 11 U.S.C. sections 503(b), 506(c) or 507;

10. That there shall not at any time be entered in this Chapter 11 proceeding or any subsequent Chapter 7 proceeding any further Order which authorizes (a) the use of cash collateral of the Debtor or the sale, lease or other disposition of property of the estate of the Debtor in which United Jersey Bank has an interest or (b) under 11 U.S.C. Section 364 of the obtaining of credit or the incurring of indebtedness secured by a lien or security interest which is equal or senior to a lien or security interest held by United Jersey Bank or which is entitled to priority administrative status which is equal or superior to that granted to United Jersey Bank; unless (i) United Jersey Bank shall have given its prior written consent thereto, or (ii) such other Order requires that there shall first be indefeasibly paid in full to United Jersey Bank all debts and obligations of Debtor and Debtor-In-Possession which either now exist or arise or result from any of the obligations, loans, credit, security interests and liens described and authorized herein. The security interests and liens granted to United Jersey Bank hereunder and the obligations shall not be altered, modified, extended, impaired or affected by any Plan of Reorganization, or by any Order of the Court unless consented to by United Jersey Bank in writing;

11. That entry of this Order shall be without prejudice to the rights and remedies of a trustee or the official creditors

committee to timely seek review or assert defenses to the extent, validity and priority of the pre-petition security interest or claims of United Jersey Bank, validated herein;

12. That in the event United Jersey Bank assigns its rights against the Debtor to a third party, such third party shall have all the rights, benefits and remedies of United Jersey Bank hereunder;

13. That United Jersey Bank shall have the right upon telephone notice to the Debtor, at any time during the Debtor's normal business hours, to inspect, audit, examine, check, make copies of or extracts from records of the Debtor or any collateral, and the Debtor shall make all of its records and the collateral available to United Jersey Bank for such purposes;

14. That nothing contained herein shall be construed to obligate United Jersey Bank to make any loans or advances to the Debtor or Debtor-In-Possession;

15. That the Debtor and Debtor-In-Possession acknowledge and consent to the extent, validity and priority of the pre-petition liens and security interests of United Jersey Bank, for the indebtedness set forth in paragraph 6 herein, in all accounts receivable; presently existing or hereafter arising or acquired; motor vehicles, trucks, tractors and trailers as more particularly described in the security agreements and certificates of title, all of which are incorporated herein by reference; notes, instruments, chattel paper or contract rights now existing or hereafter arising; goods and merchandise now existing or hereafter arising; all goods, instruments, documents of title, policies and certificates of insurance, securities, chattel paper, deposits or other property owned by the Debtor or in which it has an interest which are now or may hereafter be in the possession or control of United Jersey Bank, and all proceeds and products of the aforementioned collateral;

Appendix A

16. That United Jersey Bank and its employees, agents or representatives be and hereby are authorized to execute and file all financing statements, or other documentation, necessary to continue and perfect the liens and security interests granted pursuant to this Order, with the same force and effect as though executed by the Debtor and Debtor-In-Possession;

17. Notwithstanding paragraphs 6 and 10 herein, Debtor-In-Possession may advise, on not less than 5 days written notice to United Jersey Bank and its counsel (Wolff & Samson, P.A. and Robert Mulligan, Esq.) of its intention to accept any *bona fide* offer for the use, sale or lease of any of the collateral subject to the liens of United Jersey Bank, with such proceeds paid to United Jersey Bank against the foregoing indebtedness provided herein, upon consummation of any such use, sale or lease of collateral, subject to the liens of United Jersey Bank, authorized by final Court Order;

18. Notwithstanding any provisions herein, the obligations of the Debtor and Debtor-In-Possession shall become immediately due and payable to United Jersey Bank and United Jersey Bank's consent to the use, sale or lease of collateral by Debtor and Debtor-In-Possession shall be immediately revoked without further court order in the event of the earlier of: (i) entry of an order converting the within proceedings from Chapter 11 to Chapter 7 of the Bankruptcy Code; (ii) entry of an Order authorizing the appointment of a Trustee or Examiner; (iii) entry of an Order modifying or vacating the section 362(a) stay in favor of any other secured party with respect to collateral, subject to the liens of United Jersey Bank; or (iv) entry of an Order confirming a Plan of Reorganization by the Debtor-In-Possession or any other party.

Appendix A

s/ Rosemary Gambardella
Honorable Rosemary Gambardella
United States Bankruptcy Judge

The undersigned consents
to the form and entry of
the within Order:

By: s/ Richard B. Honig
Richard B. Honig,
Attorney for the Debtor
and Debtor-In-Possession

APPENDIX B — CONSENT ORDER DATED SEPTEMBER 19, 1985

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
A Professional Corporation
25 East Salem Street
P.0. Box 566
Hackensack, New Jersey 07602
(201) 488-5000
Attorneys for Debtor/Debtor
in Possession

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 85-03606 DV
Chapter 11 Proceeding

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

CONSENT ORDER MODIFYING CASH COLLATERAL ORDER

THIS MATTER, being opened to the Court by Klinger, Nicolette, Mavroudis & Honig, P.C., attorneys for Oneida Motor Freight, Inc., Debtor/Debtor In Possession, with the consent of Wolff & Samson, P.C., attorneys for secured party, United Jersey Bank; and Booth, Marcus & Pierce, Esqs., attorneys for the Official Creditors Committee; and it appearing to the Court from the annexed Application that the parties have agreed to a

modification of the Cash Collateral Order entered by the Court on July 25, 1985, as more specifically set forth below; and other good and sufficient cause being shown for the making and entry of the within Order;

IT IS on this 19th day of September, 1985,

ORDERED that the Cash Collateral Order entered by the Court on July 25, 1985, be and is hereby modified as follows:

1. Paragraphs 1 and 7 of the Cash Collateral Order authorizing the Debtor In Possession to pay weekly administration expenses up to $10,000 and to pay weekly payroll and administration expenses in excess of $10,000 only upon notice to United Jersey Bank is modified to provide that the Debtor In Possession shall have the authority, without prior notice to the bank or Creditors Committee, to use cash collateral up to the sum of $150,000 now on deposit with United Jersey Bank for payroll, utility service, insurance, taxes, and other miscellaneous Debtor In Possession obligations, exclusive of obligations for use and occupancy for the Debtor's terminals or any payments to insiders of the Debtor.

2. All other provisions of the Cash Collateral Order shall remain in full force and effect including but not limited to the provisions for adequate protection in favor of United Jersey Bank.

s/ Rosemary Gambardella
BANKRUPTCY JUDGE

Appendix B

We hereby consent to the
form and entry of the
within Order.

WOLFF & SAMSON, P.C.
Attorneys for United Jersey Bank

By: s/ William S. Katchen

BOOTH, MARCUS & PIERCE, ESQS.
Attorneys for the Official Creditors Committee

By: s/ David A. Gzesh

KLINGER, NICOLETTE, MAVROUDIS
& HONIG, P.C.
Attorneys for Oneida Motor Freight, Inc.,
Debtor/Debtor In Possession

By: s/ Richard B. Honig
RICHARD B. HONIG, ESQ.

APPENDIX C — STIPULATION AND ORDER DATED SEPTEMBER 30, 1985

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606

In Re:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

STIPULATION AND ORDER CONFIRMING SETTLEMENT AMONG UNITED JERSEY BANK, ONEIDA MOTOR FREIGHT, INC., DEBTOR AND DEBTOR-IN-POSSESSION, AND THE OFFICIAL UNSECURED CREDITORS COMMITTEE

It is hereby stipulated by and among the above parties as follows:

1. That the Order of this Court entered on July 25, 1985 a copy of which is hereto annexed as Exhibit A, shall be modified and the parties hereto bound by such modification with respect to the time for payment by the Debtor and Debtor-In-Possession of the sum of $4,650,000 to United Jersey Bank on or before

Appendix C

October 3, 1985, in addition to the unconditional payment to United Jersey Bank by the Debtor-In-Possession of the sum of $2,000,000, such payments to be made on or before October 3, 1985 in cashiers, certified or bank funds to be applied to the outstanding security interest of United Jersey Bank against all accounts receivable of the Debtor; certain motor vehicles and equipment of the Debtor, as set forth in separate judgment establishing validity of security interest of United Jersey Bank in motor vehicles and other collateral and in satisfaction of the post-petition senior lien and security interest granted as adequate protection to United Jersey Bank, pursuant to this Court's Order of July 25, 1985.

2. United Jersey Bank shall be paid, with respect to its claim for deficiency, after applying the proceeds of cash collateral account in the approximate amount of $800,000 to any finally determined liability as issuer of letters of credit for the account of the Debtor, a dividend of thirty percent (payable fifteen percent in cash at the time of confirmation and an additional fifteen percent within six months from the date of confirmation) upon the same terms and conditions as the Plan of Reorganization to be filed by the Debtors and as recommended by counsel to the Official Creditors Committee.

3. In the event that the allowed claims of all general unsecured creditors of the Debtor, excluding the deficiency claims of United Jersey Bank under letters of credit referred to in the preceding paragraph hereof, are less than $9,000,000, United Jersey Bank shall be allowed to participate in a dividend payable by the Debtor of thirty percent for such amount of the deficiency claim provided such deficiency shall not, when added to all other allowed unsecured claims, exceed $9,000,000 of allowed claims. In the event that the allowed unsecured claims of all unsecured creditors

of the Debtor, without United Jersey Bank's deficiency claim aforesaid, shall equal or exceed $9,000,000, in such case the deficiency claim of United Jersey Bank, with respect to letters of credit, shall be paid the dividend of thirty percent from funds provided by insiders or affiliates of the Debtor, in order to provide a thirty percent dividend on such claim, such dividend not to exceed the amount of cash collateral used by the Debtor-In-Possession since September 19, 1985.

4. As an express condition of this Stipulation, that the entire sum of $4,650,000 be paid to United Jersey Bank on or before October 3, 1985 in addition to the $2,000,000 of proceeds of accounts receivable heretofore applied to the outstanding debt.

5. Upon unconditional payment of the above amount to United Jersey Bank on or before October 3, 1985, United Jersey Bank shall deliver to the Debtor-In-Possession, or its assigns, or any purchaser under a sales transaction approved by an Order of this Court, all liens and security interests marked satisfied with respect to the motor vehicles and accounts receivable which secured the Debtor's pre-petition and post-petition obligations to United Jersey Bank.

6. In the event of any breach of this Stipulation, including any stay against delivery of the proceeds of sale, whether or not beyond the control of the Debtor or Debtor-In-Possession, any stay against the enforcement by United Jersey Bank of its pre-petition liens and security interests against motor vehicles and accounts receivable collateral of the Debtor shall be vacated, annulled, and terminated *nunc pro tunc* to September 19, 1985.

Appendix C

WOLFF & SAMSON
Attorneys for United Jersey Bank

By: s/ William S. Katchen
WILLIAM S. KATCHEN

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
Attorneys for Debtor

By: s/ Richard B. Honig
RICHARD B. HONIG

BOOTH, MARCUS & PIERCE
Attorneys for the Official Creditors Committee

By: s/ Leon C. Marcus
LEON C. MARCUS

IT IS SO ORDERED on this 30th day of September, 1985.

s/ Rosemary Gambardella
ROSEMARY GAMBARDELLA,
U.S.B.J.

APPENDIX D — ORDER AND JUDGMENT DATED JANUARY 14, 1986

WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606DV

In Re:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER AND JUDGMENT ESTABLISHING EXTENT AND VALIDITY OF LIEN OF UNITED JERSEY BANK

This matter having been brought before the Court upon filing of a Motion by Wolff & Samson, P.A., attorneys for United Jersey Bank, seeking relief from the automatic stay provisions of section 362 of the Bankruptcy Code; to enforce security interests; to appoint Trustee and in the alternative for conversion or dismissal of the Chapter 11 case, and good and sufficient cause appearing for the making of the within Order,

IT IS on this 14th day of January, 1986

1) That there is due and owing by the Debtor to United Jersey Bank, as of the filing of Debtor's petition, $7,631,322.73 consisting

of $5,891,897.74 principal; $107,174.99 interest to July 9, 1985 and letters of credit of $1,632,250.00, to the extent paid, together with accruing interest and allowed counsel fees on the aggregate indebtedness, secured by a valid lien and first, priority security interest, under Article 9 of the Uniform Commercial Code, in all of the Debtor's accounts receivable, then existing or thereafter created; notes, instruments or chattel paper; general intangibles then owned or thereafter acquired; goods, documents of title; certificates; deposits; certain motor vehicles, tractors and trailers, and proceeds as more particularly described in the loan and security documents annexed hereto as Exhibit A to J, inclusive.

Entry of this Order is without prejudice to the Debtor's right to an accounting for service charges charged against the Debtor's account by the Bank and to apply to the Court for return of said charges if the Debtor ultimately objects to same.

s/ D. Joseph DeVito
D. JOSEPH DeVITO,
U.S.B.J.

APPENDIX E — ORDER DATED MARCH 3, 1986

KIMMELMAN, WOLFF & SAMSON
A Professional Corporation
5 Becker Farm Road
Roseland, New Jersey 07068
(201) 740-0500
Attorneys for United Jersey Bank

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Bankruptcy No. 85-03606DV

In the Matter of

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER SUPPLEMENTING ORDER AND JUDGMENT ESTABLISHING EXTENT AND VALIDITY OF LIEN OF UNITED JERSEY BANK

This matter being opened to the Court by Kimmelman, Wolff & Samson, P.A., attorneys for United Jersey Bank, upon consent to the form and entry hereof by Klinger, Nicolette, Mavroudis & Honig, attorneys for Debtor and Debtor-In-Possession, and due cause appearing

IT IS on this 3rd day of March, 1986

ORDERED that the Order and Judgment Establishing Extent and Validity of Lien of United Jersey Bank entered by this Court on January 14, 1986 (Exhibit A annexed hereto) be and hereby is supplemented as follows:

Appendix E

1. That the reservation of any rights as contained in the annexed Order by the Debtor/Debtor In Possession pertaining to service fees charged to the Debtor's account by United Jersey Bank and the reservation of any claim for an accounting with respect to said service fees be and are hereby terminated upon the payment by United Jersey Bank to the Debtor In Possession the sum of $12,164.09, which sum shall be paid within ten (10) days of the date of this Order.

2. That the reservation of jurisdiction, as contained in the Order and Judgment of January 14, 1986, be and hereby is terminated upon the entry hereof.

3. That the entry of this Supplemental Order shall constitute a Final Judgment for purposes of Rule 9021 and 8001, *et seq.* of the Rules of Bankruptcy Procedure.

s/ D. JOSEPH DeVITO
D. JOSEPH DeVITO
Bankruptcy Judge

The undersigned hereby consents
to the form and entry of the within Order.

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
A Professional Corporation
Attorneys for Oneida Motor Freight, Inc.
Debtor/Debtor In Possession

By: s/ RICHARD B. HONIG
RICHARD B. HONIG
A Member of the Firm

APPENDIX F — ORDER DATED AUGUST 14, 1986

KLINGER, NICOLETTE, MAVROUDIS
& HONIG
A Professional Corporation
550 Kinderkamack Road
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(201) 262-3000
Attorneys for Debtor

BOOTH, MARCUS & PIERCE, ESQS.
79 Fifth Avenue
New York, New York 10003
(212) 620-0300
Attorneys for Creditors Committee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 85-03606 DV
Chapter 11 Proceeding

In the Matter of:

ONEIDA MOTOR FREIGHT, INC.,

Debtor.

ORDER CONFIRMING AMENDED JOINT PLAN OF REORGANIZATION

THIS MATTER, having come on before the Court on August 14, 1986, to consider the application for confirmation of the Amended Joint Plan of Reorganization ("Plan") proposed by

the Debtor and Official Creditors Committee ("Committee"), which was filed on May 23, 1986, and it appearing that copies of the Plan and the Amended Disclosure Statement approved by this Court having been submitted to the holders of claims and interest and due notice having been given of the hearing, and the Court having made and entered its "Findings of Fact and Conclusions of Law Regarding Confirmation of the Amended Joint Plan of Reorganization", after hearing on sufficient notice;

IT IS on this 14th day of August, 1986,

ORDERED, ADJUDGED AND DECREED THAT:

1. The Amended Joint Plan of Reorganization filed by the Debtor and Official Creditors Committee herein on May 23, 1986, a copy of which is attached hereto and expressly made a part hereof, is hereby confirmed. The Debtor and Committee are authorized and directed to take all actions necessary to effectuate and consummate the Plan.

2. Pursuant to Section 1.18 of the Plan, the Effective Date* of the Plan shall be the first business day following the date on which this Confirmation Order becomes a Final Order.

3. Debtor shall continue to operate its business as Debtor In Possession, and Debtor's estate created in this Chapter 11 case shall continue in existence after confirmation of the Plan until the Effective Date, at which time the assets of the Estate, tangible and intangible, shall vest in Debtor free and clear of any and all claims, liens and encumbrances. Post-confirmation costs and expenses incurred before the Effective Date by Debtor in

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* Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Plan.

connection with the operation of its business, administration of the Estate and implementation of the Plan shall be treated as first priority administrative expenses under the Plan.

4. The Official Unsecured Creditors' Committee of Oneida Motor Freight, Inc. ("Committee") will continue in its current form after confirmation of the Plan and until the Effective Date. After the Effective Date, to the extent necessary, appropriate and required under the Plan, the Committee shall continue in existence in accordance with Article X of the Plan.

5. The law firms of Klinger, Nicolette, Mavroudis & Honig, P.C., counsel for the Debtor, and Booth, Marcus & Pierce, Esqs., counsel for the Committee, are hereby designated to serve as Joint Disbursing Agents under the Plan, subject to the provisions of Rule 11-5 and 6 of the Local Rules of Bankruptcy Procedure, and said Disbursing Agents shall receive and retain possession and control of all funds necessary to distribute pursuant to the provisions of the Plan itself and the entry of subsequent Orders by this Court.

6. The delivery by the Debtor and Singleton to the Disbursing Agents of property to be distributed pursuant to the Plan shall discharge the Debtor and Singleton of any further liability or obligation with respect to the distribution of such property, except with respect to unclaimed distributions returned to Debtor.

7. All distributions under the Plan shall be made by the Disbursing Agents in accordance with Article XI of the Plan. Any and all property held by the Debtor or the Disbursing Agents that is to be distributed pursuant to the Plan shall be held in trust for holders of claims entitled thereto and shall be segregated from other property held by such persons or entities.

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8. Pursuant to the provisions of the Plan, the Debtor and Singleton shall deposit, or cause to be deposited, with the Disbursing Agents on or before the first Distribution Date all sums sufficient to meet all of the cash obligations provided for under the Plan upon the Effective Date.

9. The Disbursing Agents shall keep true and accurate records and account for all receipts (including investment income) and disbursements. All property held by the Disbursing Agents shall be invested in accordance with Section 345 of the Bankruptcy Code, and the Disbursing Agents shall have all of the obligations imposed upon a Trustee pursuant to that section. The Disbursing Agents shall separately account for invested property. Such accounting shall reflect the current market value of such invested property. The Disbursing Agents shall prepare such accountings, file them with the Bankruptcy Court and serve them on the Debtor and the Committee (so long as it remains in existence) within seventy-five (75) days after the First Distribution Date and quarterly thereafter. The Disbursing Agents' obligations pursuant hereto and pursuant to the Plan shall continue until all property has been distributed in accordance with the Plan.

10. Except as ordered by the Court, no interest shall accrue or become payable on any distribution provided for under the Plan.

11. On the Effective Date, the Debtor is discharged from any debt that arose prior to the date hereof and any debt of the kind specified in 11 U.S.C. Section 502(g), (h) or (i), whether or not a proof of claim was filed or deemed filed, whether or not such claim accepted the Plan and whether or not the right to payment was reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed,

legal, secured, or unsecured.

12. Any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtor with respect to any debt discharged, is void.

13. Except as provided herein, the commencement or continuation of any action, the employment of process or any act to collect, recover or offset any such debt as a personal liability of the Debtor, or from property of the Debtor, is enjoined. The provisions of Section 362 of the Bankruptcy Code shall remain in full force and effect until the Effective Date.

14. Pursuant to Article IX of the Plan, all executory contracts, except those which are not specifically adopted at or before the entry of this Confirmation Order or are not the subject of a pending application to affirm and adopt, shall be and hereby are deemed rejected. Proofs of any and all claims arising from the rejection of such executory contracts must be filed on or before thirty (30) days from the date of entry of this Order.

15. All final requests for payment of administrative expenses pursuant to 11 U.S.C. Section 507(a)(1), including, without limitation, all applications for compensation of professional persons for services rendered prior to the Effective Date of the Plan, including applications of entities entitled to payment under 11 U.S.C. Section 503(b), must be filed and served on the Debtor, the Committee, and the United States Trustee within forty-five (45) days after the Effective Date, unless extended by the Court. Any claim of a kind specified in paragraphs 14 and 15 hereof that is not filed on or before the respective deadlines set forth therein, shall not participate in distributions under the Plan and shall be forever barred; and Debtor, the Estate, and the Disbursing

Appendix F

Agents shall have no further obligation or liability therefor.

16. On the Effective Date, and except as otherwise provided in the Plan itself or hereunder, the property dealt with by the Plan shall be free and clear of all claims and interests of creditors and equity security holders of the Debtor.

17. The objections to confirmation not heretofore withdrawn are overruled.

18. This Court hereby retains jurisdiction as set forth in Article XIV of the Plan.

19. The Debtor and Committee hereby are authorized to file and prosecute objections to the allowance of any claims. The administrative expenses of prosecuting any such objections shall be paid out of Debtor's general funds. All Motions or objections to the validity or amount of any claim against the Debtor arising prior to the filing of the reorganization petition and/or during the course of these proceedings, shall be served and filed on or before March 2, 1987, or such other further date or dates as may be fixed by subsequent Order of the Court.

20. Copies of this Order shall be mailed by Debtor to all creditors, equity security holders, and other parties entitled to notice, along with notice of entry hereof.

21. All claims not allowed or filed prior to the date of this Order; including post-Petition claims, and not previously barred by Order of the Court, shall be barred, if not filed within thirty (30) days after the date of mailing of notice to all creditors of the entry of this Order, such last date for filing being hereby determined to be September 26, 1986.

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22. After the date this Confirmation Order becomes a Final Order, all notices required to be given under the applicable provisions of the Bankruptcy Code and/or the Bankruptcy Rules ("Notices") shall be sent by first class mail, postage prepaid, to Klinger, Nicolette, Mavroudis & Honig, P.C., attorneys for the Debtor, and simultaneously to Booth, Marcus & Pierce, Esqs., (or its successor) who is hereby designated as the duly authorized agent of and for the Creditors' Committee, with copies to be mailed: (a) to the Debtor; (b) to the United States Trustee; (c) to the United States in accordance with Bankruptcy Rules 2002(j); and (d) to Ravin, Sarasohn, Cook, Baumgarten & Fisch, Esqs., local counsel to the Creditors Committee. Service of all Notices, as provided herein, shall constitute full and complete service on all parties-in-interest.

s/ JUDITH H. WIZMUR
JUDITH H. WIZMUR,
BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
NOV 12 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-579

In The
Supreme Court of the United States
October Term, 1988

—o—

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, A New Jersey Corporation,

Respondent.

—o—

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

ALLAN H. KLINGER
Counsel for Petitioner
KLINGER, NICOLETTE,
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CITATION OF REPORTED AND UNREPORTED OPINIONS

The decision of the United States District Court for the District of New Jersey in this case, which Petitioner previously stated was unreported, is reported at 75 B.R. 235 (D.N.J. 1987).

———o———

REASONS FOR ALLOWANCE OF THE WRIT

I. THE DECISION OF THE THIRD CIRCUIT IS IN CONFLICT WITH TWO RECENT DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS.

A. Matter of Texas Extrusion Corp.

Contrary to the argument of the Respondent in its brief in opposition to the Petition for a Writ of *Certiorari,* the decision of the United States Court of Appeals for the Third Circuit in this matter does conflict with the decision of the United States Court of Appeals for the Fifth Circuit in *Matter of Texas Extrusion Corp.,* 844 F.2d 1142 (1988), *cert.* denied, 57 U.S.L.W. 3306 (1988). In the instant case, the Third Circuit held that Petitioner's disclosure statement in its Chapter 11 bankruptcy case did not contain adequate information because it failed to disclose a possible unliquidated claim, with uncertain result, against Respondent. In *Matter of Texas Extrusion Corp.,* the Fifth Circuit stated that the Chapter 11 debtor's disclosure statement *did* contain adequate information, although *it* failed to disclose a possible claim for equitable subordination, with uncertain result, against the debtor's principal creditor. 844 F.2d at 1157. The results of Peti-

tioner's unliquidated claim herein, if prosecuted successfully, and of the debtor's claim for equitable subordination in *Matter of Texas Extrusion Corp.*, if prosecuted successfully, would be the same, to wit: an increase in the amount of assets available for distribution to general creditors.

In *Matter of Texas Extrusion Corp.*, the Fifth Circuit correctly recognized that, due to the uncertainty of the result, non-disclosure of the possible claim would not affect the adequacy of the information given to creditors. This is so because the creditors' acceptance of a proposed plan of reorganization should be based on the debtor's actual financial ability to effectuate the plan, not on conjecture as to the debtor's possible acquisition of an unknown additional amount of assets at an unforeseeable future date. In rendering its decision in the instant case, the Third Circuit failed to recognize and consider the foregoing principle of bankrutpcy law under the United States Bankruptcy Code, 11 U.S.C. section 1125. There thus exists an irreconcilable conflict between the decisions of the Third and Fifth Circuits as to adequacy of disclosure statements.

Respondent contends that *Matter of Texas Extrusion Corp.* is distinguishable from the instant case because in that case the debtor never asserted its possible claim for equitable subordination, while in the instant case Petitioner did assert its claim for lender liability against Respondent. That distinction is, however, a false distinction. The adequacy of the disclosure statement necessarily depends on the facts and circumstances as they exist at the time the disclosure statement is prepared and distributed to the creditors. Whether or not undisclosed pos-

sibilities actually occur subsequent to confirmation of the reorganization plan cannot retroactively affect the adequacy of the information at the time the disclosure was made (so long as the creditors are able to benefit from the realization of such possibilities). The information given to the creditors must be adequate to enable creditors to make an informed judgment about the proposed plan of reorganization at the time the creditors' acceptance of the plan is solicited. 11 U.S.C. sec. 1125.

B. D-1 Enterprises, Inc. v. Commercial State Bank.

The decision of the United States Court of Appeals for the Third Circuit in this matter also conflicts with the very recent decision of the United States Court of Appeals for the Fifth Circuit in *D-1 Enterprises, Inc. v. Commercial State Bank,* 852 F.2d 823 (1988). In *D-1 Enterprises, Inc.,* the Fifth Circuit held that a consent order, in a "contested matter" in a bankruptcy proceeding, lifting the automatic stay and turning over most of the debtor's assets to its principal creditor would not result in claim preclusion barring a subsequent lender liability action by the debtor against the principal creditor. The Fifth Circuit's decision in *D-1 Enterprises, Inc.* thus directly conflicts with the Third Circuit's decision in the instant case. In its decision herein, the Third Circuit used the terms "equitable estoppel" and "judicial estoppel," rather than the term *"res judicata"* that was employed by the Fifth Circuit in *D-1 Enterprises, Inc.*[1] How-

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[1] *Res judicata* was the term used by the District Court in the instant matter in ruling that orders in Petitioner's bankruptcy case precluded maintenance of an action against Respondent. *See Oneida Motor Freight, Inc. v. United Jersey Bank,* 75 B.R. 235, 238-239 (D.N.J. 1987).

ever, the Third Circuit clearly based its decision on the theory that Petitioner's lender liability action against Respondent should be barred by certain orders entered in Petitioner's bankruptcy case. Like the orders in *D-1 Enterprises, Inc.*, those orders were consent orders resulting from a "contested matter" regarding lifting of the automatic stay and the extent and validity of Respondent's lien. There thus exists an irreconcilable conflict between decisions of the Third and Fifth Circuits regarding the preclusive effect of orders entered in "contested matters" under the United States Bankruptcy Code upon subsequent litigation of claims by debtors.[2]

Given the existence of these conflicting decisions of the Circuit Courts of Appeals, this Court should grant a Writ of *Certiorari* in order to review the decision of the Third Circuit in this matter, in light of its contravention of the legislative intent of the United States Bankruptcy Code.

II. THE CASES RELIED UPON BY THE THIRD CIRCUIT ARE DISTINGUISHABLE AND INAPPOSITE.

Respondent discusses, at pages 7-9 of its brief, three cases that the Third Circuit relied upon in making its decision in this matter, and that Respondent presumably

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[2] The Court will note that Respondent suggests, in its brief at page 7 footnote 2, that *Matter of Texas Extrusion Corp.* must be inapplicable to the instant case because "the Fifth Circuit did not even cite to its opinion in *Southmark Properties* in *Texas Extrusion.*" (*Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984), a case regarding *res judicata* effect of bankruptcy proceedings, was relied upon by the Third Circuit in the present case.) The Court will also note that in *D-1 Enterprises, Inc.*, the Fifth Circuit did cite to, and expressly declined to follow, as not controlling, its decision in *Southmark Properties*. 852 F.2d at 826.

contends vindicate that decision: *County Fuel Co. v. Equitable Bank Corp.*, 832 F.2d 290 (4th Cir. 1987); *In re Galerie des Monnaies of Geneva, Ltd.*, 55 B.R. 253 (Bkrtcy. S.D.N.Y. 1985), aff'd 62 B.R. 224 (S.D.N.Y. 1986); and *Monroe County Oil Co. v. Amoco Oil Co.*, 75 B.R 158 (S.D. Ind. 1987). However, each of these three cases is distinguishable from and inapposite to the instant matter, and the Third Circuit's reliance thereon was misplaced.

A. County Fuel Co. v. Equitable Bank Corp.

The Third Circuit used the *County Fuel Co.* case to support the proposition that "equitable estoppel is required to preserve the integrity of the [bankruptcy] proceedings" because "creditors have reasonably acted in reliance." (App. 10) That use was plainly erroneous because the question whether any creditors had acted in reliance on Petitioner's bankruptcy proceedings is a question of fact that could not be determined, and should not have been determined, by the Court on the record that was before it on Respondent's motion pursuant to Rule 12 of the Federal Rules of Civil Procedure. (*See* Petition for a Writ of Certiorari at 28.) *County Fuel Co.* is also distinguishable because in that case, "successful prosecution of County Fuel's claim . . . would effectively nullify [an] adjudication" in the prior bankruptcy case. 832 F.2d at 293. By contrast, Petitioner's claims against Respondent, if successful, would not nullify any adjudication in Petitioner's bankruptcy case. (*See also* dissenting opinion of Judge Stapleton at App. 19 n.4.) Finally, there is substantial doubt whether *County Fuel Co.* was correctly decided. Like the Third Circuit's decision herein, the Fourth Circuit's decision in *County Fuel Co.* is in conflict with

the decision of the Fifth Circuit in *D-1 Enterprises, Inc., supra.*

B. In re Galerie des Monnaies of Geneva, Ltd.

In re Galerie des Monnaies of Geneva, Ltd. is distinguishable from the instant case. In that case, the bankruptcy court applied the doctrine of judicial estoppel to bar an adversary proceeding by the debtor on a preferential transfer. The debtor had affirmatively stated in its disclosure statement that it "[did] not believe any preference [had] occurred." Subsequently, the debtor learned of a possible preferential transfer, but did not amend its disclosure statement. Then, on the day of confirmation of its reorganization plan, it brought an adversary proceeding to recover the preferential transfers. In the instant case, by contrast, Petitioner plainly set forth the factual bases for this lawsuit in its disclosure statement, which also provided that Petitioner was reserving any claims or causes of action it had not released. Respondent was aware that Petitioner had refused to release Respondent from all potential claims or causes of action.

A further distinction in the instant case is that Petitioner's plan of reorganization and the confirming order both provide for retention of jurisdiction by the bankruptcy court. Consequently, the creditors of Petitioner can benefit from the prosecution of this lawsuit. In the *Galerie* case, on the other hand, bankruptcy court jurisdiction was not retained. Therefore, "a post-confirmation preference avoidance [would] benefit the debtor, not its creditors." *Galerie*, 55 B.R. at 260. This was a crucial consideration in the *Galerie* court's decision. (*See also,*

as to the distinction between *Galerie* and the instant matter, dissenting opinion of Judge Stapleton at App. 23-24.)

C. Monroe County Oil Co. v. Amoco Oil Co.

The Third Circuit used the *Monroe County* case to support the proposition that a debtor must disclose any litigation likely to arise in a nonbankruptcy context. (App. at 8.) The problem is that the Third Circuit thus used *Monroe County* to support a legal conclusion, without considering the disputed fact question upon which that conclusion depends—whether Petitioner made adequate disclosure. Indeed, Petitioner believes the content of its disclosure statement, the refusal of its counsel to give Respondent a general release, and the reservation in its reorganization plan of all claims not expressly released were adequate to put a creditor as sophisticated as Respondent on notice of the possibility of future litigation. (*See* dissenting opinion of Judge Stapleton at App. 22-23 & n.7.)

Monroe County is also distinguishable from the instant case in that the debtor therein "stated in its plan of reorganization that it retained 'all causes of action it may have under the United States Bankruptcy Code,' [but] made no reference to litigation likely to arise in a nonbankruptcy context." 75 B.R. at 162. By contrast, Petitioner herein reserved for prosecution after entry of the Confirmation Order all claims that had not been expressly released or terminated. (*See* App. at 23.)

III. RESPONDENT'S SUPPOSED RELIANCE ON PETITIONER'S ALLEGED SILENCE DURING ITS BANKRUPTCY CASE IS A FICTION THAT THIS COURT SHOULD DISREGARD.

Petitioner submits that the Third Circuit's decision contravenes the purposes of the United States Bankruptcy

Code. (Petition for Writ of Certiorari at 10-24.) Respondent attempts to refute that argument by trying to convince the Court that Respondent somehow relied upon Petitioner's alleged silence during its bankruptcy case and would be prejudiced if Petitioner were now permitted to assert a lender liability claim against Respondent. (Respondent's Brief at 13-14.)

The questions of alleged reliance by and prejudice to Respondent are questions of fact that this Court cannot resolve. Nonetheless, this Court can take cognizance of the egregious procedural error of the Third Circuit in resolving those fact questions, without an appropriate record, on a motion pursuant to Rule 12 of the Federal Rules of Civil Procedure. (Petition for Writ of Certiorari at 25-30.)

In order to defuse Respondent's attempt to distort the equities of the case, however, Petitioner respectfully calls the Court's attention to the following chronology. The arrangement for Petitioner's use of Respondent's cash collateral, and Petitioner's acknowledgment of the extent and validity of Respondent's lien, were embodied in an Order of the bankruptcy court dated July 25, 1985. That Order was followed by a Consent Order of September 19, 1985, modifying the cash collateral order, and by a Stipulation and Order of September 30, 1985, regarding payment of the amounts owed by Petitioner to Respondent. Petitioner's Schedules of Assets and Liabilities and Statement of Financial Affairs, the silence of which Respondent allegedly relied upon in agreeing to the foregoing orders, were not filed until *October* 1985. Petitioner's Disclosure Statement, the silence of which Respondent also allegedly relied upon, was not filed and distributed

until Spring 1986. Clearly, therefore, Respondent cannot validly claim reliance on Petitioner's silence. Furthermore, since Respondent was paid in full (except for certain post-petition interest and counsel fees) by October 1985, Respondent also cannot validly claim it would be prejudiced by its reliance.

Moreover, if the preclusionary ruling of the Third Circuit is allowed to stand, the effect will be to cause chaos, confusion and distortion even in the most routine bankruptcy cases. A Debtor will be compelled to disclose and raise at every stage of the case any and all possible causes of action, defenses or claims even though they may be speculative, contingent or inchoate. Such speculative disclosure will frustrate a Debtor's ability to propose and confirm a Plan of Reorganization. This grievous result, clearly violative of Congress' intent, is foreseen by the editors of the Bankruptcy Law Letter, which, in commenting on the Third Circuit's holding, opined that:

> If the decision in *Oneida Motor Freight, Inc.* is correct, a debtor will be obligated to (1) outline any claims it may have in its schedules, (2) raise the claims as counterclaims at every stage in the case, and (3) disclose the claims in any disclosure statement and plan. Whether such 'saber rattling' might have a chilling effect on the ability and willingness of parties to negotiate in a case or on the debtor's ability to obtain confirmation of a plan of reorganization is not considered by the Third Circuit in its decision.

"Valuation, Claims, and Estoppel in Bankruptcy Cases," 8 *Bankr. L. Ltr.* (WG&L) No. 10, at 2 (October 1988) (annexed hereto as Supplementary Appendix) (quoted segments at Supp. App. 5).

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CONCLUSION

This case presents important questions of federal bankruptcy law. Furthermore, the decision of the Third Circuit Court of Appeals conflicts with *two* decisions of the Fifth Circuit Court of Appeals regarding those important questions of federal bankruptcy law. By virtue of the foregoing, and for the reasons set forth in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition should be granted.

Respectfully submitted,

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Dated: Oradell, New Jersey
November 11, 1988

PETITIONER'S SUPPLEMENTARY APPENDIX

BANKRUPTCY LAW LETTER

Vol. 8, No. 10 October 1988

Valuation, Claims, and Estoppel in Bankruptcy Cases

In adopting the Code, Congress recognized that the courts would be asked to value property at different times and for different purposes during the course of a bankruptcy case. To accomplish this, Section 506(a) was structured to provide that in valuing an allowed secured claim, the court should keep in mind the purpose of the valuation as well as any proposed use or disposition of property subject to the claim. After the Code was adopted, the bankruptcy courts recognized that there would be a need to limit litigation that related to the value of a claim. As a result, where a creditor sought relief from the automatic stay, several cases, including *Lexington Racquetball Club, Inc.* (58 Bankr. 103 (Bankr. E.D. Pa. 1986)) and *Transleisure Corp.* (41 Bankr. 201 (Bankr. E.D. N.Y. 1984)), have held that hearings on request for relief from the stay are not hearings at which full adjudication of counterclaims a debtor may have against the creditor should occur.

First and Second Mortgages. Two recent cases now question the holdings in these earlier decisions. The first case, *Georgia Granite Co.,* (86 Bankr. 733 (Bankr. N.D. Ga. 1988)), involved two motions for relief from the stay. One motion was brought by a creditor holding a first mortgage seeking relief under Section 362(d)(2). That section permits relief when the debtor does not have an equity in the property and the property is not necessary to an effec-

tive reorganization. The hearing on the creditor's motion, while scheduled within the 30-day period required by Section 362(e), was continued from time to time until a determination in favor of the creditor was finally made eight months later.

Stipulation as to Lack of Equity. In the interim, a creditor holding a second montgage on the property had obtained relief from the stay by a stipulation in which the debtor agreed that once the claims of creditors holding security interests in the property were valued, there was no equity in the property. Before the motion of the creditor holding the first mortgage was decided, the debtor concluded that its stipulation with the second creditor as to the lack of equity might have been in error due to an overstatement of the extent of the lien held by the first creditor.

The first creditor suggested that the debtor was estopped from asserting that there was equity in the real estate. Its theory was that the issue had been litigated and resolved by the consent order, which lifted the stay as to the creditor holding the second mortgage. The debtor, on the other hand, contended that it should not be estopped in light of new evidence discovered with respect to the first secured debt.

Debtor Estopped. Bankruptcy Judge W. Homer Drake, Jr. found for the creditor and granted relief from the stay. The court concluded that the debtor possessed sufficient incentive to defend against the motion for relief from the stay brought by the holder of the second mortgage and yet failed to do so. Having stipulated that there was no equity

in that action, the debtor was estopped from asserting that it had equity in response to the motion of the first creditor.

Newly Discovered Evidence. The court also rejected the claim of the debtor that since its position was based on newly discovered evidence, application of the collateral estoppel doctrine was inappropriate. The court noted that newly discovered evidence will only preclude application of the doctrine if the party against whom estoppel is asserted was deprived of the crucial evidence in the prior litigation without fault of its own. Since the debtor knew of the documents (upon which its claim that the first creditor's lien was overstated) when it stipulated for relief in the second action, the documents could not be categorized as newly discovered evidence.

Prepetition Credit Agreement. A second estoppel case is *Oneida Motor Freight, Inc.* (848 F.2d 414 (3d Cir. 1988)). The schedules filed by the debtor in the case did not disclose any claims asserted by the debtor against its principal secured creditor. When the creditor sought relief from the stay, a stipulation was entered into that fixed the extent of the creditor's security interest. The amount due the creditor was subsequently paid in full. Nothing in the debtor's disclosure statement or plan of reorganization suggested that it was contemplating litigation against the creditor.

Nevertheless, after the plan of reorganization was confirmed, the debtor commenced an action in state court alleging that the creditor had breached a prepetition credit agreement entered into between the debtor and the creditor. The debtor alleged that the creditor had failed to act in accordance with the previous course of dealing between the

parties and that the creditor had breached its duty of good faith. The debtor included claims for relief based on fraudulent misrepresentation and damage to its business reputation.

Principles of Preclusion Violated. The creditor removed the action to the U.S. District Court and then moved to dismiss. The district court granted the motion, determining that the debtor's claims against the creditor arose from the same transactions that were the subject of the extensive prior brankruptcy proceedings. The creditor's failure to bring the claims to the bankruptcy court's attention thus violated fundamental principles of preclusion and barred the debtor from proceeding with the postconfirmation action.

"Deafening" Silence. Affirming, the Third Circuit categorized the silence of the debtor during the bankruptcy case with respect to its alleged claims against the creditor as "deafening." The court concluded that the debtor had failed to meet its "express obligation of candid disclosure," which it determined to be present in bankruptcy cases.

WG&L Comment: The court in *Oneida Motor Freight, Inc.* emphasized the failure of the debtor to raise any claims or counterclaims in its schedules, in its disclosure statement and in connection with the creditor's motion to lift the automatic stay. The court suggested that although full litigation of counterclaims might not be appropriate in connection with lift stay matters, nothing precluded the debtor from raising counterclaims at that time.

Having failed to disclose the existence of potential claims at appropriate stages in the case, the debtor was

estopped from later commencing its action against the creditor.

If the decision in *Oneida Motor Freight, Inc.* is correct, a debtor will be obligated to (1) outline any claims it may have in its schedules, (2) raise the claims as counterclaims at every stage in the case, and (3) disclose the claims in any disclosure statement and plan. Whether such "saber rattling" might have a chilling effect on the ability and willingness of parties to negotiate in a case or on the debtor's ability to obtain confirmation of a plan of reorganization is not considered by the Third Circuit in its decision.

Equally troublesome is the decision in *Georgia Granite Co.* From the evidence in the case, there seems little doubt that there was equity in the property. The court's use of the estoppel theory to prevent the debtor from utilizing this equity—notwithstanding its failure to pursue the defense in the first motion for relief—therefore harmed not only the debtor but also its creditors.

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Editor's Note: Cases reviewed in this issue were reported through September 15, 1988. The Bankruptcy Reform Act of 1978 is referred to herein as the Code; the former Bankruptcy Act is referred to as the Act; the Uniform Commercial Code is referred to as the UCC.

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No. 88-579

In The

Supreme Court of the United States

October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

vs.

UNITED JERSEY BANK, a New Jersey Corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION PURSUANT TO SUPREME COURT RULE 22.6

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Citation of Statute Involved:

11 U.S.C. §502(a):

§502. *Allowance of Claims or Interests*

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partnership that is a debtor under Chapter 7 of this title objects.

No. 88-579

In The

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October Term, 1988

ONEIDA MOTOR FREIGHT, INC., a corporation organized under the laws of the State of New York,

Petitioner,

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UNITED JERSEY BANK, a New Jersey corporation,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION PURSUANT TO SUPREME COURT RULE 22.6

REASONS FOR DENYING THE WRIT

THE THIRD CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE RECENT DECISION OF THE FIFTH

CIRCUIT IN D-1 ENTERPRISES, INC. V. COMMERCIAL STATE BANK.

Contrary to the assertions by Petitioner Oneida Motor Freight, Inc. ("Oneida"), the Third Circuit's decision in this case in no way conflicts with the recent decision of the Fifth Circuit in *D-1 Enterprises, Inc. v. Commercial State Bank,* 852 F.2d 823 (5th Cir. 1988), a case first cited by Oneida in its reply brief.[1] In fact, the court's holding in *D-1 Enterprises* was limited to the applicability of *res judicata* and the compulsory counterclaim rule to the particular facts and circumstances of that case where the debtor *abandoned* its property to its secured creditor and did not address or even consider the issues of equitable and judicial estoppel on which the Third Circuit relied in rendering its decision. (Petitioner's Original Appendix 2, hereinafter "Pet. App.").[2] Nor did the court in *D-1 Enterprises* have to consider the *res judicata* effect of an order confirming a Plan of Reorganization. *See Stoll v. Gottlieb,* 305 U.S. 165, reh'g denied 305 U.S. 675 (1938).[3]

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1. This supplemental brief is being filed on behalf of Respondent United Jersey Bank ("UJB") pursuant to Supreme Court Rule 22.6 to address the recent holding of the Fifth Circuit in *D-1 Enterprises, Inc. v. Commercial State Bank,* 852 F.2d 823 (5th Cir. 1988), pet. for reh'g and reh'g *en banc* pending, a case which was not cited by Oneida in its Petition for a Writ of Certiorari.

2. In an attempt to create a conflict where none exists, Oneida misrepresents the holding and the rationale of the Fifth Circuit's decision in *In re Texas Extrusion Corp.*, 844 F.2d 1142 (5th Cir. 1988) cert. denied, 57 U.S.L.W. 3306 (1988). In that case, the court found that the failure to include information in a disclosure statement about a claim which was "mere conjecture" did not render the disclosure statement inadequate. *Id.* at 1157. *See also,* UJB's Brief in Opposition at 6-7, which discusses the holding of the *Texas Extrusion* case.

3. Indeed, *Stoll v. Gottlieb* was not even cited by the Court in *D-1 Enterprises.*

In *D-1 Enterprises*, the Fifth Circuit went to great lengths to detail the numerous and significant factual distinctions between that case and its prior decision in *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984). The distinguishing factors cited by the court in *D-1 Enterprises* highlight the substantial differences between the case now before the Court and *D-1 Enterprises* and clearly demonstrate how the two decisions are reconciled.

First, in the present case, Oneida did not commence its action against UJB until seven months after Oneida's plan of reorganization was confirmed, and more than one year after the extent, validity and priority of UJB's lien was finally established by a series of bankruptcy court orders consented to by Oneida. *See* UJB's Brief in Opposition at 4-5. In contrast, the debtor in *D-1 Enterprises* filed an adversary proceeding against its secured lender in Bankruptcy Court *during the debtor's pending bankruptcy case* and prior to the termination of the debtor's reorganization proceedings. *D-1 Enterprises, Inc. v. Commercial State Bank*, 852 F.2d at 824. As was noted by the court in *D-1 Enterprises*, "the end of the reorganization is the critical point" in determining the claim preclusive effect of a prior bankruptcy court order. *Id.* at 825. *See Stoll v. Gottlieb*, 305 U.S. 165, reh'g denied 305 U.S. 675 (1938) (affirming the finality and integrity of bankruptcy court orders confirming plans of reorganization and holding that such orders preclude a party from relitigating any of the matters that *could have been raised during the bankruptcy proceedings). See also*, 5 *Collier on Bankruptcy* ¶ 1141.01(1) (15th Ed. 1988).

Second, in the present case and in *Southmark Properties*, the operative bankruptcy court orders "necessarily determined" the precise amount of debt owed to the secured creditor and that the debt had been validly accelerated, while no such determination was made in *D-1 Enterprises*. *D-1 Enterprises, Inc. v. Commercial*

State Bank, 852 F.2d at 825-826. In the instant case, four separate bankruptcy court orders were entered confirming the validity of UJB's claim against the Oneida, culminating in the Bankruptcy Court's Order of January 14, 1986 which established the extent, validity and priority of UJB's claim against the Debtor for $7,631,322.73. (Respondent UJB's Appendix 18a-19a, hereinafter "Resp. App."). In recognition of UJB's lawful acceleration of the Oneida indebtedness, the Bankruptcy Court ordered that the proceeds from the sale of UJB's collateral be *unconditionally* paid to UJB. (Resp. App. 16a). As was noted by the Fifth Circuit in its analysis of the *Southmark Properties* case, such actions are inconsistent with Oneida's later assertion of lender liability claims against UJB. *D-1 Enterprises v. Commercial State Bank,* 852 F.2d at 825-26, citing *Southmark Properties,* 742 F.2d at 869.

Another distinguishing characteristic of the present case is that Oneida was specifically authorized to and did affirm, ratify and adopt its pre-petition loan agreement and security agreement with UJB pursuant to the July 12, 1985 Order of the Bankruptcy Court. (Resp. App. 2a). Further, in *D-1 Enterprises,* the debtor's assets were *abandoned* to its secured creditor, *D-1 Enterprises,* 852 F.2d at 824-826, while in this case and in *Southmark,* the secured creditor's collateral was *sold* pursuant to bankruptcy court order. (Resp. App. C); *Southmark Properties Corp. v. Charles House Corp.,* 742 F.2d at 872.

Fourth, as was expressly recognized by the Third Circuit, Oneida obtained UJB's consent to the use of $1.5 million of UJB's cash collateral while it remained deceptively silent as to any alleged claims against UJB. (Resp. App. 12; Pet. App. A and B).

Fifth, Oneida never asserted its alleged claims against UJB at any time during its settlement negotiations with UJB or in the

extended proceedings leading to confirmation of its Plan of Reorganization. In *D-1 Enterprises,* the debtor clearly disclosed its intention to pursue claims against its secured creditor by obtaining a bankruptcy court order authorizing the debtor to hire outside counsel to pursue potential lender liability claims against the secured lender, and then commencing its action *during the debtor's continuing bankruptcy case.* 852 F.2d at 824 (emphasis added). *Compare Paradise Hotel Corp. v. Bank of Nova Scotia,* 842 F.2d 47 (3d Cir. 1988), where the Third Circuit held that the debtor had preserved its claims against the debtor's secured creditor by unequivocally disclosing its intent to pursue those claims in the *initial* responsive pleadings filed with the bankruptcy court. *Id.* at 48-52.

In this case, Oneida did not bring its action against UJB until *after* the validity of UJB's claim was established and seven months *after* Oneida's Plan of Reorganization, which did not include any alleged claim against UJB, was confirmed by final order of the bankruptcy court. (Resp. Brief at 4-5). *See Stoll v. Gottlieb,* 305 U.S. 165, reh'g denied 305 U.S. 675 (1938). Moreover, Oneida did not object to UJB's filed proof of claim at any time prior to confirmation. As a result, UJB's claim was deemed to be allowed under 11 U.S.C. § 502(a) (1988).

Finally, the Order confirming Oneida's Plan of Reorganization (Resp. App. F), the Plan of Reorganization itself, and Oneida's Disclosure Statement expressly provided for separate classification and payment of UJB's deficiency claim against Oneida, but made no attempt to set-off or expressly reserve Oneida's right to pursue its alleged lender liability claims against UJB, nor did Oneida's Disclosure Statement, Schedules or Statement of Affairs reserve any rights with respect to those claims.

(Pet. App. 7-8).[4] Further, Oneida clearly recognized the requirement that pending or contemplated litigation be disclosed since it included a separate section in its disclosure statement entitled *Pending and Possible Litigation Affecting Distribution to Creditors.* While that section mentioned several specific claims Oneida intended to pursue, *it did not make any reference to the alleged claims against UJB.* (Pet. App. 8-9). *See Monroe County Oil Co. v. Amoco Oil Co.,* 75 B.R. 158 (S.D. Ind. 1987).

As a result of Oneida's "deafening silence" with regard to its alleged claims against UJB and in order to preserve the requisite reliability of disclosure statements and to provide assurances to creditors regarding the finality of plans which are approved, the Third Circuit properly held that Oneida was equitably and judicially estopped from pursuing its alleged claims against UJB, and concluded that "Oneida's failure to list its claim against the bank worked in opposition to the preservation of the integrity of the system which the doctrine of judicial estoppel seeks to protect." (Pet. App. 9-10, 14).

As is demonstrated above, the holding of the Fifth Circuit in *D-1 Enterprises* and that of the Third Circuit are not in conflict and are actually reconciled by the distinct factual contexts of each case, rather than any conflict in the legal principles applied by each court. The absence of any such actual conflict requires that Oneida's petition for a writ of certiorari be denied.

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4. Although Oneida failed to reserve any rights with respect to its alleged lender liability claims, it did temporarily reserve rights *only* as to a specific claim against UJB for service charges. (Resp. App. 19a). By Order entered on March 3, 1986, the reservation of rights contained in the January 14, 1986 Order was expressly terminated upon payment of the sum of $12,164.09 to Oneida by UJB. (Resp. App. 21a).

CONCLUSION

Based on the foregoing and for the reasons set forth in United Jersey Bank's Brief in Opposition to Oneida's Petition for a Writ of Certiorari, it is respectfully submitted that Oneida's Petition should be denied.

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